

THE Indian Succession Act

(ACT XXXIX OF 1925)

(With Comparative Tables, Notes on Clauses,
Joint Committee's Report, Table of Cases,
Annotations, Comparative Tables,
Appendices, Forms and Pleadings,
etc. etc.)

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Preface to the Second Edition

In a great majority of cases, the Indian wills are of a simple character, seldom delving into the complexities of English legacies, and yet we find a good deal of knocking about or beating about the bush both at the bars also on the Bench during argument in Probate or Administration cases. Ordinarily, only a very limited number of sections fall for consideration in our Probate or Administration Courts, yet considerable confusion and lack of appreciation mark the decisions of our law Courts; this is rather unfortunate. If two dozen sections of the Act are carefully read in the light of the terms defined in the Act, such as, "executor", "will", "probate", etc and if the elementary principles of vesting and contingent interests, and of the vesting and defeasance provisions are carefully noted, much of the miscarriage of justice or of prolonged hearing of will matters can be avoided. The Act has spoken of an appointment of executor in express terms or by necessary implication. There is no such thing as a contingent executor. So perchance if the testator has made an appointment dependent on a contingent event, that event must have to happen during the life-time of the testator, so that the executorial appointment might be complete co-incident with the testator's death. In a case before our Courts a so-called contingent executor was held to fulfil the contingency long after the testator's death. This is hopeless misconception of law. Again, the effect of sec. 211 of the Act vests the testator's estate in the executor, the moment the testator dies irrespective of the question whether or not the probate has yet to be taken. Illustrations of ill appreciation of the provisions of the Act are innumerable and frequent and in this edition, we have made efforts to guard against the same, but how far we have succeeded we do not know. The occasion of a fresh edition has been fully utilised to incorporate herein the recent and up-to-date decisions.

Preface to the First Edition

The present consolidating Act, replacing as it does, a number of enactments on the Indian law relating to succession, was moulded and re-enacted with the obvious object (as the Legislature itself puts it) of simplifying the Statute Book and rendering the law easy of ascertainment; and it may fairly be said that the Legislature has earned the gratitude of the entire legal profession for the services rendered in effecting the much coveted consolidation. The sections in the Act have been logically classified and grouped together and been assigned their respective appropriate places. Having regard to the complexity of the subject and the diversity of the sects existing in the Country, a more satisfactory arrangement of the sections in the Act can scarcely be conceived, and we feel sure it will please everybody excepting the fastidious critics. We would only desire that the Legislature, instead of confining itself to the task of consolidating the law, had effected certain amendments in respect of those provisions of it which, with the advancement of civilisation and growth of more enlightened legal conceptions have now come to be regarded as obsolete.

This re-shuffling of the law has occasioned the necessity of new commentaries of the Act, and the present publication is designed to meet this growing demand. As most of the provisions in the Act have practically evolved out of English decisions, they must necessarily form a considerable part of the annotations in the book; but it has been our constant endeavour to present the English cases in a form and a language which the Indian lawyer is very much familiar with. An attempt has also been made to incorporate in the book every useful information without unnecessarily swelling its bulk, as the primary duty of a commentator, as we conceive it, is to explain and elucidate the law and to indicate the evolution of the principles underlying it as briefly as he can, and not to unnecessarily crowd the pages with extensive quotations from the head-notes of reported cases in a form wherein the principle of law is not easily discernible. Verbosity unnecessarily taxes both the time and the purse of the lawyer, and we have been particularly careful in guarding against it. This present work has however been profuse in the matter of citations and references. Almost every reported case, wherever found, has been given a place in it. We are, of course, conscious that widespread citation is not universally approved; but we cannot shut our eyes to the fact that such disapproval generally proceeds either from the journalists to whom the idea of frequent citation from a rival publication is not very much comforting, or from judges to whom considerable citation from the bar causes embarrassment in no small degree. It may be pointed out that a legal

precedent does not owe its importance to the report wherein it is found, nor to the person by whom it is reported, but to the fact that it is a pronouncement from the Bench after elaborate discussion between the learned and eminent members of both the branches of the legal profession. It will be seen from the innumerable luminous decisions of the late Sir Ashutosh Mukherji (a greater jurist than whom has perhaps never adorned an Indian Bench) that no case, no report, was ever considered by him unworthy of citation as a judicial precedent. We think that there is sufficient justification for maintaining that to a person who has adopted law as a religion and who is well grounded in legal principles, widespread citation is never terrifying. Here, I ought to make one thing perfectly clear. I have departed from the usual practice of prefacing every criticism of a judicial decision with an apologetic assurance of deference to the learned Judge who pronounced it, as, in my humble opinion, inability to see eye to eye with a learned judge, not involving the remotest implication of disrespect towards him, this warranty of reverence is simply superfluous. In point of veneration for the learned judges, I yield to no one, and I shall be extremely sorry if non-observance of what I consider to be a ridiculously idle formality be ever interpreted as a lack of proper reverence for them on my part.

In conclusion, I have got to acknowledge my indebtedness to my numerous friends who have helped me in the preparation of the work and to the various learned authors who have gone before me and from whom I have derived much light. My special thanks are due to my esteemed lawyer friend Babu Sachindra Kumar Roy, M.A., B.L., Vakil, Calcutta High Court, but for whose ungrudging assistance, this book would have perhaps never seen the light of day.

A. C. Ghose

BHOWANIPORE,

February, 15, 1926.

LIST OF AMENDING ACTS AND ADAPTION ORDERS

1. The Indian Succession (Amendment) Act, 1926 (37 of 1926).
2. The Indian Succession (Second Amendment) Act, 1926 (40 of 1926)
3. The Repealing and Amending Acts, 1927 (10 of 1927).
4. The Repealing Act, 1927 (12 of 1927)
5. The Indian Succession (Amendment) Act, 1927 (18 of 1927).
6. The Indian Succession (Amendment) Act, 1928 (14 of 1928).
7. The Indian Succession (Amendment) Act, 1929 (18 of 1929).
8. The Transfer of Property (Amendment) Supplementary Act, 1929 (21 of 1929).
9. The Indian Succession (Amendment) Act, 1931 (17 of 1931).
10. The Amending Act, 1934 (36 of 1934).
11. The Government of India (Adaptation of Indian Laws) Order, 1937.
12. The Indian Succession (Amendment) Act, 1939 (17 of 1939).
13. The Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.
14. The Indian Succession (Amendment) Act, 1949 (35 of 1949).
15. The Adaptation of Laws Order, 1950
16. The Part B States (Laws) Act, 1951 (9 of 1951)
17. The Repealing and Amending Act, 1952 (48 of 1952).
18. The Repealing and Amending Act, 1953 (42 of 1953).
19. The Indian Succession (Amendment) Act, 1957 (34 of 1957).
20. The Indian Succession (Amendment) Act, 1962 (XVI of 1962)

LIST OF ABBREVIATIONS USED

A.O. 1937	... ...	for Government of India (Adaptation of Indian Laws) Order, 1937.
A.O. 1948	... ...	for Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.
A.O. 1950	... ...	for Adaptation of Laws Order, 1950.
C.L.	... ...	for Clause.
G.O.I.	... ...	for Government of India.
Ins.	... ...	for Inserted.
P.	... ...	for Page.
Pt	... ...	for Part.
Rep.	... ...	for Repealed.
S.	... ...	for Section.
Sch.	... ...	for Schedule
Subs	for Substituted
W.e.f.	for with effect from.

THE INDIAN SUCCESSION ACT

ACT No. XXXIX OF 1925.

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STATEMENT OF OBJECTS AND REASONS.

The object of this Bill is to consolidate the Indian Law relating to succession. The separate existence on the statute book of a number of large and important enactments renders the present law difficult of ascertainment and there is, therefore, every justification for an attempt to consolidate it.

The Bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made. The details of the Bill are more particularly discussed in the attached Notes on Clauses.

NOTES ON CLAUSES OF THE ORIGINAL BILL.

Clause 2.—The General Clauses Act, 1897 (X of 1897), will apply to the Bill. The definitions therefore of "person," "year," "month," "immoveable property," "moveable property," "State Government" and "High Court" are unnecessary and are omitted. The definitions of "India" and "District Judge" have also been omitted as the definitions in the General Clauses Act appear more suitable and do not change the substance of the law. The definition of "province" has been omitted, as, notwithstanding the ruling in 12 W.R., 424, it does not appear that the omission will lead to any administrative inconvenience. The definition of "minor" and "minority" is adopted from section 8 of the Probate and Administration Act 1881 (V of 1881), and seems appropriate to the consolidated Bill. No change has been made in the other definitions which are taken from Act X of 1865, though one or two could perhaps have been more suitably worded. The definition of "Indian Christian" is taken from the Native Christian Administration of Estates Act, 1901 (VII of 1901) except that the phrase "Indian Christian" has been used instead of "Native Christian" following the modern practice in this respect.

Clause 3—This is based on section 332 of the Indian Succession Act, 1865 (X of 1865), but in the consolidated Bill it is necessary to confine its operation to those provisions which are derived from that Act. The use of the term "exempted person" is a drafting device which enables the language of the Bill to be shortened.

Clause 4—The second proviso to this clause is taken from the last paragraph of section 2 of the Married Woman's Property Act, 1874 (III of 1874). This provision comes in appropriately here and it is proposed to repeal the corresponding provision in the Act in question.

Clause 5—It is well settled that the word "Hindu" in section 331 of the Indian Succession Act, 1865 and in section 2 of the Probate and Administration Act, 1881, includes Jains and Sikhs (cf. I.L.R. 31 Cal 11, etc.) and as the Hindu Wills Act, 1870, which the Bill consolidates makes special mention of Sikhs and

Jainas they are separately mentioned throughout the Bill. This and other similar sections may need to be qualified if and when the Special Marriage (Amendment) Bill, which has just been passed by the Indian Legislature, becomes law.

Clauses 6 to 20 deal with domicile and are reproductions of the corresponding sections of the Act of 1865. They are for the most part general rules which might well be applicable to all classes, but clause 6 reproducing section 931 of the Act of 1865 excludes their application in the case of Hindus, Muhammadans, Buddhists, Sikhs and Jainas.

Part III deals with intestate succession and is based on the appropriate provisions of the Indian Succession Act, 1865 (X of 1865) and the Parsi Succession Act, 1865 (XXI of 1865).

Clauses 46 to 52 and Schedule II contain special rules as to intestate succession among Parsis.

Clause 53.—The proviso to this clause gives effect to one of the provisions of sections 8 of the Parsi Succession Act and taken together with the preceding clauses reproduces the whole of that Act, which it is therefore proposed to repeal.

Part IV deals with testamentary succession.

Clause 56 read with Schedule III, reproduces those provisions of the Hindu Wills Act 1870 (XXI of 1870) which relate to testamentary succession. Section 187 of the Indian Succession Act, 1865 (X of 1865), applied by the Hindu Wills Act has been dealt with in another part of the Bill and will be dealt with under the appropriate clause.

Part V—deals with protection of the property of the deceased. It is largely based on the Succession (Property Protection) Act, 1841 (XIX of 1841). This Act was framed under the old system of drafting and certain slight verbal changes of language have had necessarily been made in introducing its provisions in the consolidated Bill, but reference will be made under the appropriate clauses to all changes which are other than purely verbal.

Clause 196—This clause is taken from section 23 of the Succession Certificate Act, 1889 (VII of 1889), but which as it limits the power of the curator appropriately fails in this Part of the consolidated Bill.

Clause 197—The words "moveable" and "immovable" have been substituted for the words "personal" and "real".

Clause 198—The words "High Court" have been substituted here and in other places in this Part where they occur for the words "Court of Sadar Diwan Adalat."

Clauses 204, 205 and 206—These clauses have been recast as they are drawn in a form which is no longer employed in modern Acts.

Part VI—This is an important portion of the Bill which deals with title to the property of the deceased. It is only by separating these provisions of the law that a clear view can be obtained of the requirements of the Indian law as to grants by the Court in the case of the estate of a deceased person. By separating the law in this manner, the consolidation of those provisions of the law relating to probate and grant of administration which are now contained in the Indian Succession Act, 1965 (X of 1865), and the Probate and Administration Act, 1881 (V of 1881), are rendered possible.

Clause 210—This reproduces the important section 190 of Act X of 1865 which requires that no right to any part of the property of a person who has died intestate can be established in any Court without letters of administration. The very important qualification which excludes the operation of this section in the case of the intestacy of Hindus, Muhammadans, Buddhists, Sikhs, Jainas and Indian Christians is based on section 381 of Act X of 1865 and section 8 of Act VII of 1901.

Clause 211—reproduces the corresponding important provision in the case of testate succession contained in section 187 of Act X of 1865 with the important qualification provided for by section 381 of Act X of 1865 read with the application of section 187 of Act X of 1865 read with the section 2 of the Hindu Wills Act, 1870 (XXI of 1870).

Clause 212—reproduces the provisions of section 4 of the Succession Certificate Act, 1889 (VII of 1889).

Clause 213—This clause is intended to reproduce the effect of section 162 of the Probate and Administration Act and section 21 of the Succession Certificate Act, and appears to come in appropriately under this Part of the Bill since it deals with the substitution of the title of the grantee for that of the certificate holder.

With reference to this Part of the Bill, it will be observed that the arrangement of the clauses brings out very clearly the anomalous position in the Indian law with regard to the requirements of proof of representative title to the property of a deceased person.

Part VII—The provisions of the the Indian law regarding the grant of probate and administration of the assets of a deceased person are to be found in the Indian Succession Act, 1865 (X of 1865), and the Probate and Administration Act, 1881 (V of 1881). Those sections of the Succession Act which deal with representative title have already been disposed of by the preceding Part of the Bill and with those exceptions the provisions of the two Acts on the subject are with comparatively small differences identical. This Part of the Bill therefore provides in general terms for the administration of the assets of deceased persons of all classes covered by the two Acts in question and provides in its separate

clauses such special exceptions which are necessitated in order that the existing law may be reproduced.

Clause 215—reproduces section 179 of Act X of 1865 subject to the proviso in the case of survivorship for those classes of persons who are provided for by section 4 of Act V of 1881.

Clause 218—As in the case of Hindus, Muhammadans, Buddhists, Sikhs, Jainas and exempted persons, probate can be granted to a married woman without the consent of her husband, the provisions of section 8 of Act V of 1881 are here incorporated with those of section 183 of Act X of 1865.

Clause 223—Here, again, section 18 of Act V of 1881 is incorporated with section 189 of Act X of 1865 for the same reason.

Clauses 233 and 234—The right to the grant of administration is dealt with by section 23 of Act V of 1881 and by sections 200 to 207 of Act X of 1865. Clause 233 reproduces the former rule and clause 234 the latter.

Clause 239—Section 212 of the Act of 1865 uses the word "attorney." Section 28 of the Act of 1881 uses the word "agent." Both words are used in the consolidated Bill.

Clauses 240 and 241—The same remarks apply as in the case of clause 239.

Clause 242—In view of the wider scope of the Bill, the language of section 31 of the Act of 1881 has been followed, i.e., the words "had attained his majority" have been substituted for the words "shall have completed the age of 18 years."

Clause 244—Section 217 of the Act of 1865 does not deal with the case of minors. Section 33 of the Act of 1881 does. As it appears to be merely *census omisssus* and the provision is in accordance with actual practice, the language of section 33 of the Act of 1881 has been adopted.

Clause 246—The same remarks apply as in the case of clauses 240 and 241.

Clause 247—Curiously enough both section 36 of the Act of 1881 and section 220 of the Act of 1865 use the word "attorney". It would appear a drafting slip in the Act of 1881 and the words, "or agent", have been added.

Clause 248—The language of section 37 of the Act of 1881 has been adopted, but there is no change in the substance.

Clause 262—The proviso incorporates the provisions of section 2 of the Act of 1881.

Clause 267—Sub-section (2) incorporates the provision of section 3 of Act VII of 1901 and as the provision is not incorporated in the Act of 1881, it excludes the persons to whom that Act relates from the purview of the clause.

Clause 274.—The law to be reproduced is contained in section 244 of the Act of 1865 and section 62 of the Act of 1881. The latter Act, however, contains the additional words "or for letters of administration with will annexed" and also the words "or in the cases mentioned in sections 24, 25 and 26 a copy, draft or statement of the contents thereof." The provisions of the Act of 1881 seem necessary to complete the law and they have been adopted *mutatis mutandis* in the clause.

Clause 275.—Similarly the words "copy of draft" which only occur in section 63 of the Act of 1881 have been adopted.

Clause 276.—This clause is based on section 246 of the Act of 1865 and section 64, Act V of 1881. Here again there is a discrepancy between the two sections. Under section 246 a petition must state that the deceased left some property within the jurisdiction of the District Judge or District Delegate to whom the application is made. Under section 64 in the case of an application to a District Judge the petition must state either that the deceased at the time of his death had a fixed place of abode or had some property situate within the jurisdiction of the Judge. The Bill follows the language of section 246. As a slight change in the law is involved attention is drawn to the point and similarly to the fact that the words "a fixed place of abode" are used in the Bill in this clause also in order that the wording of the clause may be consistent with the wording of clause 274. Furthermore although section 244 requires in the case of an application to a District Judge that the petitioner should state that the deceased had "his fixed place of abode" within the jurisdiction of the Judge, that section in the case of an application to a District Delegate requires that the petition shall state that the deceased "resided" within the jurisdiction of the Delegate. This discrepancy is apparently explained by the fact that the paragraph was inserted by the District Delegates Act, 1881 (VI of 1881). Section 62 on the contrary uses the phrase "fixed place of abode" in both places. It seems doubtful whether it is necessary to maintain the discrepancy in the language of section 244 and the Bill uses "fixed place of abode" in both places, but it seems that attention should be drawn to the point.

Clause 289 —The proviso embodies the different rules provided by section 78 of the Act of 1881.

Clause 295 —This reproduces section 339 of Act X of 1865 and section 157 of Act V of 1881 which are in identical terms. These sections were added in their respective Acts by section 17 of Act VI of 1889 and are obviously out of position in those Acts.

Clause 299 —The proviso embodies the provisions in that behalf in section 2 of Act V of 1881.

Clause 302 —This clause is necessary as the provisions of the Act 1865 relating to "executors of their own wrong" were not included in the Act of 1881.

Clause 305—The wording of section 88 of the Act of 1881 has been adopted. It is more in consonance with the language of the Indian drafterman and involves no change of substance.

Clause 307—Sub-section (2) reproduces the provisions of section 90 of the Act of 1881 which were inserted in that Act by section 14 of Act VI of 1890.

Clause 311—The words "in absence of any directions to the contrary in the will or grant of letters of administration" which occur in section 93 of the Act of 1881 have been adopted in the clause as they appear to state the law more accurately.

Clause 316—The wording of section 97 of the Act of 1881 has been followed as it is more suitable to the wider scope of the consolidated Bill and involves no change of substance.

Clause 334—This reproduces section 283 of the Act of 1865. Neither this section nor section 284 has a corresponding provision in the Act of 1881. Sub-clause (3), therefore, excludes from the operation of the clause those to whom the Act of 1881 applies.

Clause 327—Here again the wording of section 107 of the Act of 1881 has been adopted as it states the law more accurately.

Clause 332—This corresponds to section 292 of the Act of 1865 which is the first section in Part XXXV of that Act which is headed 'Of the Executor's Assent to a Legacy.' This at once raises the question of section 148 of the Act of 1881. That section runs as follows: "In Chapters VIII, IX, X and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed." These Chapters deal with (1) the executor's assent to a legacy, (2) the payment and apportionment of annuities, (3) the investment of funds to provide for legacies and (4) the refunding of legacies. They correspond to Parts XXXV, XXXVI, XXXVII and XXXIX of the Act of 1865 but that Act contains no specific provision of the kind contained in section 148. To take the first question, the executor's assent to a legacy, it would seem that the executor and the administrator with the will annexed are in exactly the same position. The reason the assent of the executor is necessary is that the estate of the deceased is vested in the executor and the legatee's title to the legacies is only inchoate. Equally this is true of the administrator with the will annexed. It would seem therefore that under the Indian Succession Act the assent of an administrator with the will annexed to a legacy is probably necessary though no specific provision exists. It is well settled law in England that this is so see *Doe versus Mobberley*, 6 C. and P. 126. *Broker versus Charter Cro.* Eliz. 92. Similarly the other provisions specifically mentioned in section 148 appear to be applicable to cases under the Indian Succession Act. The Bill has been drafted to give effect to this view by specific amendments.

Clause 345—This reproduces section 305 of the Act of 1865, but, as the provision does not occur in the Act of 1881, the proviso inserted is necessary.

Clause 360—This clause reproduces section 320 of the Act of 1865 and section 139 of the Act of 1881. It would be preferable if the wording of section 139 had been adopted, but this would involve a slight change in the law.

Clause 370—is based on section 1 (4) of the Succession Certificate Act, 1869 (VII of 1889) with the exception in the proviso which is based on section 5 of Act VII of 1901. The effect of the section here reproduced is apparently that succession certificate cannot be granted in a case where the law requires probate or letters of administration to establish a representative title before the Court. In cases where letters of administration or probate are not essential, i.e., cases falling within the Act of 1881, a certificate can apparently be granted. The clause is based on this view of the law.

Clause 371.—In this clause and the rest of this Part, the words 'District Judge' have been used in order to assimilate this Part to the rest of the Bill.

'N.B.—The numbers of the clauses in the Original Bill do not tally with the numbers of the sections in the present Act. So, while dealing with the notes on any particular clause, care should be taken to find out the number of the corresponding section in the new Act, to which they relate).

REPORT OF THE JOINT COMMITTEE.

The following Report of the Joint Committee on the Bill to consolidate the law applicable to intestate and testamentary succession in India was presented to the Council of State on the 26th August, 1925 :—

We, the undersigned Members of the Joint Committee to which the Bill to consolidate the law applicable to intestate and testamentary Succession in India was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit this our Report, with the Bills as amended by us annexed thereto.

The Committee met on 30th June, the Honourable Sir Henry Moncrieff Smith, President of the Council of State, being elected Chairman. Further sittings were held on the 1st, 3rd and 4th July, the following members being present in addition to the Chairman :—

The Honourable Sir NARASIMHA SARMA,
The Honourable Sir ALEXANDER MUDDIMAN,
The Honourable Sayyid RAZA ALI,
The Honourable Sir DEVA PRASAD SALVADHIKARY,

The Honourable Sir ARTHUR FROOM,
 Rai Sabib HARIBILAS SARDA,
 Mr. K. C. NSOGY, and
 Mr. ABDUL HAYE.

A final meeting was held on the 17th August to consider the redraft of the Bill at which Diwan Bahadur M. Ramachandra Rao also was present.

2. Many of the opinions elicited on circulation of the Bill involve amendments of the existing law and this, in our opinion is outside the scope of the Bill which has been referred to us. The Bill is purely a consolidating Bill and some of those who have submitted opinions have clearly treated it as such, and it would not be advisable or within our competence, for us to consider amendments of the existing law in connection therewith. The papers which we have considered however indicate that there is a considerable volume of opinion in favour of amending the existing law and we invite the attention of the Government to this fact.

3. Suggestions have been made for the inclusion of the undermentioned enactments in this Bill, but for the reasons hereunder given we are not of opinion that these should be consolidated with the present Bill.

The Hindu Disposition of Property Act, 1916--As only a part of the Act relates to succession, the consolidation of this portion alone would not simplify the Statute Book as section 5 of the Act cannot suitably be included in the amending Bill, and this section requires that the provisions of the Act relating to succession should continue to be enacted therein.

The Special Marriage (Amendment) Act, 1923--The principal Act is of special application and it is advisable that even the rules of succession applicable to persons who marry under that Act should be enacted in the special Act which deals with the status of such persons.

The Wills Act, 1838, and the Inheritance Act, 1839--These relate only to wills and intestacies occurring before the 1st January, 1866, and in all probability will be spent at an early date.

The Legal Representative Suits Act, 1855--This cannot wholly be included in the consolidating Bill; the provisions of the Act are substantially reproduced in the Bill, but we have decided *ex m jori cautela* not to repeal the provisions of this Act.

We agree with the Statute Law Revision Committee that it would be difficult to incorporate the provisions of the *Indian Fatal Accidents Act, 1855*, in the consolidated Bill.

The Ouh Estates Act, 1869, and the Malabar Wills Act, 1898--These are enactments of local interest which would not properly find a place in a general

consolidating enactment. This applies also to Bombay Regulation VII of 1827.

4. The following NOTES ON CLAUSES explain the amendments which we have made in the Bill:

Clause 2—It has been pointed out that the omission of the definition of "provinces" given in the Indian Succession Act, 1865 (and the consequent application of the definition given in the General Clauses Act, 1897), does alter the existing law. We have, therefore, inserted in new clause (g) the original definition.

Clause 3 (1)—This has been brought into line with the provisions of section 392 of the Indian Succession Act, 1965, which operate from the date stated.

New Part III—Original clauses 54 and 55 have been taken out of original Part IV and, with original clause 4, formed into a new Part dealing with the effect of marriage on rights of succession.

Part IV, clauses 23 to 28—We have taken the clauses relating to consanguinity from original Part III (intestate succession) and formed them into a separate Part, new Part IV, as in Act X of 1865. The operation of these clauses is not limited to cases of intestate succession.

Clause 35—We are of opinion that the provisions relating to the rights of a widower are more appropriately inserted here.

Claves 38—Illustration (c) has been transferred to clause 40, as illustration (d) as the illustration properly relates to that clause.

Clause 49—We have amended this clause to express the meaning more clearly.

Clause 111—We have omitted Illustration (b) as it might give the impression that a child in the womb is excluded which is not the existing law.

Parts VII and VIII—The amendments made are purely drafting amendments. Original clause 216 has been inserted in Part VIII as clause 211 and original clause 293 as clause 216 as they deal with the question of representative title. In clause 214 (1) (a) and in the heading to the Part we have added the words "on succession" as a majority of us are of opinion that the addition is necessary to make it clear that no change has been made in the existing law.

Clause 217—We have amended the clause to make it clear that it refers to intestate as well as testamentary succession.

Part IX, Chapter I—We have re-arranged the provisions in the following order: (1) administration in case of intestacy, (2) probate, (3) letters of administration.

Clause 245—The wording of section 82 of Act V of 1881 has been followed as this covers both cases.

Clause 267 (3)—The word "truly" has been added to remove any doubt as to what is clearly the intention of the provision.

Clause 278 (1) (e)—The wording has been assimilated to that in clause 274 (2) (a).

Clause 291—In the case of probate a bond can only be demanded from the special classes to whom Act V of 1881 applies.

Clause 302 (of the original Bill)—We have omitted this clause as the Chapter enunciates general principles of law which *suo vigore* apply to Hindus and the other specified communities.

Clauses 322 and 352—The words added have been taken from sections 103 and 181 of Act V of 1881.

Clause 323—The words omitted are merely explanatory and are not to be found in section 104 of Act V of 1881.

Clause 332—An administrator is not mentioned in section 992 of Act X of 1865 but for the reasons given in the note on this clause attached to the original Bill we are of opinion that an administrator should also be mentioned here.

Schedule III—The necessary omission in section 70 has been made in view of the first proviso contained in section 3 of Act XXI of 1870. We have excluded from this Schedule section 72 which deals with the revocation of privileged wills, as section 65 which permits of privileged wills being made is not included. The inclusion then of section 59 of the Indian Succession Act, 1865 (now clause 72 of the Bill in section 2 of the Hindu Wills Act, 1870), was meaningless as section 52 of the former Act was not also included.

5 The publication ordered by the Council has been made as follows:—

In English.

<i>Gazette</i>	<i>Date.</i>
Gazette of India	4-8-28
Port Saint George Gazette	21-8-28
Bombay Government Gazette	4-10-28
Calcutta Gazette	5-9-28
United Provinces Gazette	26-8-28
Punjab Government Gazette	9-9-28
Burma Gazette	15-9-28
Central Provinces Gazette	26-8-28
Assam Gazette	15-8-28
Bihar and Orissa Gazette	6-9-28

Coorg District Gazette	...	... 1-9-23
Sindh Official Gazette	...	... 11-10-23
North-West Frontier Gazette	...	... 12-10-23

In the Vernacular.

<i>Provinces.</i>		<i>Language.</i>	<i>Date.</i>
Madras	...	Tamil	... 22-4-24
		Telugu	... 12-8-24
		Hindustani	... 11-9-24
		Kanarese	... 30-9-24
		Malayalam	... 14-10-24
		Oriya	... 15-7-24
Burma	...	Burmese	... 24-11-23

6. We think that the Bill has not been so altered as to require re-publication. We do not suggest that the final passing of the Bill should be delayed till an amending Bill generally overhauling the law of succession has been introduced and taken through the Legislature. This would very considerably delay the passage of the present Bill, which as a purely consolidating measure should prove of great utility, and we recommend that it be passed as now amended.

H. MONCRIEFF SMITH.

B. N. SABMA.

A. P. MUDDIMAN.

DEVAPRASAD SARVADHIKARY.

RAZA ALI.

A. H. FROOM

HARABILAS SARDAR.

K. C. NEOGY.

ABDUL HAYE.

M. RAMACHANDRA RAO.

The 21st August, 1925.

COMPARATIVE TABLES.

SHOWING DISTRIBUTION IN THE NEW ACT OF THE SECTION OF THE REPEALED ACTS.

(I) The Succession Property Protection Act (XIX of 1841.)

Section of Act XIX of 1841.	Section of the New Act.	Section of Act XIX of 1841.	Section of the New Act.
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2	192 (2)	13	204
3	193	14	205
4	194	15	206
5	195	16	207
6	196	17	208
7	198	18	209
8	199	19	210
9	200	20	Repealed by Act VIII of 1855
10	201		
11	202		

(II) The Indian Succession Act (X of 1865)

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
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2	29 (2), 58 (2), 217	11 12	11 12
3	2	13	13
4	20	14	14
Part II.—Of Domicile.		15	15
5	5	16	16
6	6	17	17
7	7	18	18
8	8	19	19

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
Part III—Of Consanguinity.		48	61
20	24	49	62
21	25	Part VIII—Of the Execution of Unprivileged Wills.	
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23	27	51	64
24	28	Part IX—Of Privileged Wills.	
Part IV—Intestacy.		52	65
25	30	53	66
26	32	Part X—Of the Attestation. Revocation, Alteration and Revival of Wills.	
27	33	54	67
28	34	55	68
Part V—Of the Distribution of an Intestate's Property (a) Where he has left lineal Descendants.		56	69
29	36	57	70
30	37	58	71
31	38	59	72
32	39	60	73
33	40	Part XI—Of the Construction of Wills.	
(b) Where the Intestate has no lineal Descendants.		61	74
34	41	62	75
35	42	63	76
36	43	64	77
37	44	65	78
38	45	66	79
39	46	67	80
40	47	68	81
41	48	69	82
42	49	70	83
Part VI—Of the Effect of Marriage and Marriage- Settlements on property.		71	84
43	55	72	85
44	51	73	86
45	52	74	87
Part VII—Of Wills and Codicils.		75	88
46	59	76	69
47	60	77	90
		78	91
		79	92
		80	93

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
81	94	114	127
82	95	115	128
83	96	116	129
84	97	117	130
85	98	118	131
86	99	119	132
87	100	120	133
88	101	121	134
89	102	122	135
90	103	123	136
91	104	124	137
92	105	Part XVII—Of Bequest with Direc-tions as to Application Enjoyment.	
93	106	125	138
94	107	126	139
95	108	127	140
96	109	Part XVIII—Of Bequest to an Executor.	
97	110	128	141
98	111	Part XIX—Of Specific Legacies.	
Part XII.—Of Void Bequests.		129	142
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100	113	131	144
101	114	132	145
102	115	133	146
103	116	134	147
104	117	135	148
105	118	136	149
Part XIII.—Of the vesting of Legacies.		137	150
106	119	138	151
107	120	Part XX—Of Demonstrative Legacies.	
108	121	139	152
Part XIV.—Of Onerous Bequests.		140	153
109	122	141	154
110	123	142	155
Part XV.—Of Contingent Bequests.		143	156
111	124	144	157
112	125		
Part XVI.—Of Conditional Bequests.			
113	126		

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
145	158	173	187
146	169	174	188 (1)
147	160	175	188 (2)
148	161	176	189
149	162	177	190
150	163	Part XXVIII—Of Gifts in contempla- tion of Death.	
151	164	178	191
152	165	Part XXIX—Of Grant of Probate and letters of administration.	
153	166	179	211
Part XXII—Of the Payment of Liabilities in respect of the subject of a Bequest.		180	228
154	167	181	222 (1)
155	168	182	222 (2)
156	169	183	223
157	170	184	224
Part XXIII—Of Bequests of things described in General Terms.		185	225
159	171	186	226
Part XXIV—Of Bequests of interests or Produce of a Fund.		187	213
169	172	188	227
Part XXV—Of Bequests of Annuities.		189	236
160	173	190	212
161	174	191	220
162	175	192	221
163	176	193	229
Part XXVI—Of Legacies to Creditor and Portioners.		194	230
164	177	195	231
165	178	196	232
166	179	197	233
Part XXVII—Of Election.		198	234
167	180	199	235
168	181	200	219
169	182	201	219 (a)
170	183	202	219 (b)
171	184	203	219 (c)
172	185	204	219 (d)
	186	205	219 (e)
	186	206	219 (f)
	186	207	219 (g)

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
	Part XXX—Of Limited Grants.		Part XXXI—of the Practice in granting and revoking Probate and Letters of Administration.
	<i>Grants limited in duration.</i>		
208	287	286	264
209	288	286A	265
210	289	286	266
211	240	287	267
	<i>Grants for the use and benefit of others having right.</i>		
212	241	288	268
213	242	289	269
214	243	240	270
215	244	241	271
216	244	241A	272
217	245	242	273
218	245	242A	274
	<i>For special purposes.</i>		
219	248	243	275
220	249	244	276
221	250	245	277
222	251	246	278
223	252	246A	279
224	253	247	280
225	254	248	281
	<i>Grants with exception.</i>		
226	255	249	282
227	256	250	283
	<i>Grants of the rest.</i>		
228	257	251	284 (1, 2, 8)
	<i>Grants or effects unadministered.</i>		
229	258	252	285
230	259	253	286
231	260	254	287
	<i>Alteration in grants.</i>		
232	261	255	288
233	262	256	289, Sch. VI.
	<i>Revocation of grants.</i>		
234	263	257	290
		258	291
		259	292
		260	293
		261	294
		262	295
		263	296
		264	297
		265	298
		266	299

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
264A	301	Part XXXV—On the Executor's assent to a legacy.	
264B	302	292	332
Part XXXII—of Executors of their own wrong.		293	333
265	303	294	334
266	304	295	335
Part XXXIII—of the powers of an Executor or Administrator.		296	336
267	305	297	337
268	306	Part XXXVI—of the payment and apportionment of annuities.	
269	307	298	338
269A	308	299	339
269B	309	300	340
270	310	Part XXXVII—of the Investment of Funds to provide for Legacies.	
271	311	301	341
272	312	302	342
273	313	303	343
274	314	304	344
275	315	305	345
Part XXXIV—of the Duties of an Executor or Administrator.		306	346
276	316	307	347
277	317	308	348
277A	318	Part XXXVIII—of the Produce and Interest of Legacies.	
278	319	320	349
279	320	321	350
280	321	322	351
281	322	323	352
282	323	324 (1)	353
283		324 (2)	354
284		325	355
285		326	356
286		327	357
287		328	358
288		329	359
289		330	360
290		Part XXXIX—of the Refunding of Legacies.	
291		331	361

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
317	367	Part XL—Of the Liability of an Executor or Administrator for Devastation.	
318	368	327	368
319	369	328	369
320	360	Part XLI—Miscellaneous.	
321	361	331	4, 20, 29, 58 212, 218
322	362	332	8
323	363	333	396
324	364		
325	365		
326	366		
326A	367		

(III) The Parsi Intestate Succession Act (XXI of 1865)

Section of Act XXI of 1865.	Section of the New Act.	Section of Act XXI of 1865.	Section of the New Act.
1	50	5	54
2	51	6	55
3	52	7	56
4	53	8	29(2), 31

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(IV) The Hindu Wills Act (XXI of 1870)

Section of Act XXI of 1870.	Section of the New Act.	Section of Act XXI of 1870.	Section of the New Act.
2	57, Sch. III.	6	Sch. III.
3	57, Sch. III.		

(V) The Probate and Administration Act (V of 1881)

Section of Act V of 1881.	Section of the New Act.	Section of Act V of 1881.	Section of the New Act.
Chapter I—Preliminary.		32	245
2	217, 264, 300	33	246
3	2	34	247
Chapter II—Of Grant of Probate and Letters of Administration.		(c) For special purposes.	
4	211	35	248
5	228	36	249
6	222 (1)	37	250
7	222 (2)	38	251
8	223	39	252
9	224	40	253
10	225	41	254
11	226	(d) Grants with exception.	
12	227	42	255
13	226	43	256
14	220	(e) Grants of the rest.	
15	221	44	257
16	229	(f) Grants of effects unadministered.	
17	230	45	258
18	231	46	259
19	232	47	260
20	233	Chapter IV—Alteration and Revocation of grants.	
21	234	48	261
22	235	49	262
23	218	50	263
Chapter III—Of Limited Grants.		Chapter V—Of the Practice in gran- ting and Revoking Probates and Letters of Administration.	
(a) Grants limited in duration.		51	264
24	287	52	265
25	238	53	266
26	239	54	267
27	240	55	268
(b) Grants for the use and benefit of others having right.		56	269
28	241	57	270
29	242	58	271
30	243	59	272
31	244	60	273
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Section of Act V of 1881.	Section of the New Act.	Section of Act V of 1881.	Section of the New Act.
61	276	95	314
62	276	96	315
63	277	Chapter VII—Of the Duties of an Executor or Administrator.	
64	278	97	316
65	279	98	317
66	280	99	318
67	281	100	319
68	282	101	320
69	283	102	321
70	284(1, 9, 9)	103	322
71	284(4)	104	323
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73	286	106	326
74	287	107	327
75	288	108	328
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77	290	110	330
78	291	111	331
79	292	Chapter VIII—Of the Executors' Assent to a Legacy.	
80	293	112	332
81	294	113	333
82	295	114	334
83	296	115	335
84	297	116	336
85	298	117	337
86	299	Chapter IX—Of the payment and Apportionment of annuities.	
87	300	118	338
87A	301	119	339
87B	302	120	340
Chapter VI—Of the Powers of an Executor or Administrator.		Chapter X—Of the investment of Funds to provide for Legacies.	
88	305	121	341
89	306	122	342
90	307	123	343
90A	308	124	344
90B	309	125	345
91	310		
92	311		
93	312		
94	313		

Section of Act V of 1881.	Section of the New Act.	Section of Act V of 1881.	Section of the New Act.	
126	347	Chapter XIII—Of the Liability of an Executor or Adminis- trator for Devastation.		
127	348	146	368	
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129	350	148	382, 383 (2), 384	
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131	352		399, 342, 344	
132	353		347, 356, 367	
133	354		358, 359, 361	
134	355		363	
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135	356	150	217	
136	357	151	Repealed by Act VII of 1889.	
137	358	152	215	
138	359	153	Repealed by Act VII of 1889.	
139	360	154	67 & Sch. III.	
140	361	155	Spent	
141	362	156	Repealed by Act IX of 1908	
142	363		296	
143	364			
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(VI) The District Delegates Act (VI of 1881.)

Section of Act VI of 1881.	Section of the New Act.	Section of Act VI of 1881.	Section of the New Act.
1	Short Title.	7	286, 287, 288
2	265	8	289 (and Sch. VI) 290 (and Sch. VII)
3	272		348
4	276 (2) (b)		
	278 (1)		
5	284	9	278, 289, 299, 290 etc.
6	285		

(VII) The Probate and Administration Act (VI of 1889.)

Section of Act VI of 1889.	Section of the New Act.	Section of Act VI of 1889.	Section of the New Act.
1	Short Title	14	807
2	263 (e)	15	817
3	276(1)(d) & (e)	16	818
4	Sch. VI & Sch. VII	17	296
5	290	18	Repealed by Acts XII of 1891 & XVII of 1914
6	291		
7	317		
8	Repealed by Act X of 1914.	19	spent
9	324	20	Repealed by Act XI of 1899.
10	296		
11	263(e)	21	Repealed by Act XII of 1891.
12	289 & Sch. VI		
13	290 & Sch. VII.		

(VIII) The Succession Certificate Act (VII of 1889.)

Section of Act VII of 1889.	Section of the New Act.	Section of Act VII of 1889.	Section of the New Act.
Preamble		16	881
1	870	17	882
2	.....	18	883
3 (2)	370 (2)	19	884
4	214	20	885
5	371	21	216
6	372	22	886
7	373	23	197
8	374	24	spent
9	375	25	887
10	376	26	888
11	377	27	889
12	378	28	890
13	(Not repealed).		
14	879	Schedule I	Repealed
15	880	Schedule II	Schedule IV

(IX) The Probate and Administration Act (V of 1890.)

Section of Act V of 1890.	Section of the New Act.	Section of Act V of 1890.	Section of the New Act.
1 to 8	Repealed by Act II of 1913.	10 to 15	Repealed by Act III of 1913.
9	967	16	967

(X) The Native Christians Act (VII of 1901)

Section of Act VII of 1901.	Section of the New Act.	Section of Act VII of 1901.	Section of the New Act.
Preamble		3	212, 269
1	Short title	4	Repealed
2	2 (d)	5	970 (Proviso)

(XI) The Probate and Administration Act (VIII of 1903.)

Section of Act VIII of 1903.	Section of the New Act.	Section of Act VIII of 1903.	Section of the New Act.
1	Short title	2 (7)	818
2 (1)	213	8 (1)	273 (Proviso)
2 (2)	273 (Proviso)	8 (2)	274
2 (3)	274	8 (3)	276 (3)
2 (4)	276 (3),		278 (2)
	278 (2),	8 (4)	283 (3)
2 (5)	279	4	Repealed by Act X of 1914.
2 (6)	283 (3)		

NOTE

(1) Sections of the New Act and corresponding Sections of the old Acts have been placed side by side. Old Sections and Acts are in brackets.

(2) Following abbreviations have been used for the old Acts :—

SUC S.—The Indian Succession Act, (X of 1865.)

SUC. P. P. A.—The Succession (Property Protection) Act, (XIX of 1841.)

SUC. CERT.—The Succession Certificate Act, (VII of 1889.)

N. C. A.—The Native Christians Admn. of Estates Act, (VII of 1901)

H. W.—The Hindu Wills Act, (XXI of 1870)

PRO.—The Probate & Administration Act, (V of 1881.)

PARSI. SUC.—The Parsi Intestate Succession Act, (XXI of 1865)

D. D. A.—The District Delegates Act, (VI of 1881.)

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ABBREVIATIONS OF IMPORTANT ENGLISH REPORTS.

A. C.	... Appeal Court, Chancery, Appeal Cases.
A. & E. or Ad. & E.	... Adolphus and Ellis's Reports K.B.
Abr. Ca. Eq.	... Abridgment of Cases in Equity.
Add. E. R.	... Addam's Ecclesiastical Reports.
Amb.	... Amber's Reports, Chancery.
App. Cas.	... Law Reports, Appeal Cases.
Atk.	... Atkyn's Reports, Chancery.
B & Ad.	... Barnwell and Adolphus's Reports K.B.
B C. O.	... Bail Court Cases, Lowndes and Maxwell
Ball & E.	... Ball and Beatty's Reports, Chancery Ireland.
B. & P.	... Bousanquet and Peller's Reports, C.B.
Br. C. C.	... Brown's Chancery Cases.
Br. P. C.	... Brown's Parliamentary Cases.
Beav.	... Beavan's Reports, Rolls Court.
Bing.	... Bingham's Reports, Common Pleas.
Bing. N. C.	... Bingham's New Cases, Common Pleas.
Blj.	... Bligh's Reports, House of Lords.
Boul.	... Boulnoir's Reports.
Bourke	... Bourke's Reports.
Burr.	... Burrows Reports.
Camp.	... Campbell's Reports.
C. B.	... Common Bench Reports.
C. B. (N. S.)	... Common Bench (New Series).
C. P.	... Common Pleas.
C. & P.	... Carrington and Payne's Reports, N.P.
C. P. D.	... Law's Reports, Common Pleas Division.
Cas. Temp. Lee	... Cases in the time of Lee.
Cas. Temp. Talbot	... Cases in the time of Talbot.
Cl. & Fin.	... Clarke and Finnelly's Reports, House of Lords.
Ch. D.	... Chancery Division.
Coll.	... Collyer's Reports, Chancery.
Cowp.	... Cowper's Reports, King's Bench.
Cox	... Cox's Reports, Chancery.
C. & J.	... Crompton and Jervis' Reports, Exchequer.
Cro. Eliz.	... Croke's Reports (Elizabeth)

Cro. Jac.	... Croke's Reports (James I).
Curtis	... Curtis' Ecclesiastical Reports.
De G. & J.	... De Gex and Jones's Reports.
De G. F. & J.	... De Gex Fisher & Jones's Reports.
De G. M. & G.	... De Gex Macnaghten and Gordon's Reports.
Dick.	... Dicken's Reports, Chancery.
Dow.	... Dow's House of Lords Cases.
Dow & C.	... Dow and Clark's Reports.
Dowl.	... Dowling's Reports.
Drew.	... Drewry's Reports, Chancery.
Dr. & Sim.	... Drewry and Smale's Reports, Chancery.
East	... East's Reports, King's Bench.
Eden	... Eden's Reports.
E. & B.	... Ellis and Blackburn's Reports, Queen's Bench.
Eq.	... Equity Reports.
Eq. Ca. Ab.	... Equity Cases Abriged.
Exch.	... Exchequer Reports.
Ex. D.	... Law Reports Exchequer Division
Finch	... Finch's Reports.
Hagg.	... Haggard's Ecclesiastical Report.
Hare	... Hare's Reports, Chancery.
Holt Eq.	... Holt's Equity Reports.
Ir. Eq. R.	... Irish Equity Reports.
Ir. R.	... Irish Reports.
Jac.	... Jacob's Reports.
Jurist	... Jurist Reports.
K. B.	... Law Reports, King's Bench Division.
Kay	... Kay's Reports
Kay & J.	... Kay and Johnson's Reports, Chancery.
Knapp	... Knapp's Reports, Privy Council.
Leon.	... Leonard's Reports, King's Bench.
L. J. Ch.	... Law Journal, Chancery.
L. R. Ch.	... Law Reports, Chancery.
L. R. Eq.	... Law Reports, Equity Cases.
L. R. Exch.	... Law Reports, Exchequer.
L. R. P. C.	... Law Reports, Privy Council.
L. R. P. & D.	... Law Reports, Probate and Divorce Cases
M. & K.	... Mylne's and Keene's Reports.
M. & P.	... Moore and Payne's Reports.
M. & W.	... Meeson and Welshy's Reports.
Mac. & G.	... Macnaghten and Gordon's Reports, Chancery.
Madd.	... Maddock's Reports, Chancery.
Mer.	... Merivale's Reports' Chancery.

[Annex]

Mod.	... Modern Reports King's Bench.
Moore P. C.	... Moore's Privy Council Reports.
P. Wms.	... Peere Williams's Reports, Chancery.
P. D.	... Law Reports, Probate Division.
P. & D.	... Perry and Davidson's Reports, K.B. or Law Reports, Probate and Divorce.
Plam.	... Palmer's Reports, K. B.
Phillim.	... Phillimore's Reports, Chancery.
Q. B.	... Adolphus and Ellis, Queen's Bench Reports, New Series.
Q. B. D.	... Law Reports, Queen's Bench Division.
Rob.	... Robertson's Ecclesiastical Reports.
Russ.	... Russell's Reports, Chancery.
Soh. & Let.	... Scholes and Letroy's Reports.
Salk.	... Salkeids Reports, King's Bench.
Sim. & St.	... Simen and Stuart's Reports.
Style	... Style's Reports, King's Bench.
Swan.	... Swanston's Reports, Chancery.
Sw. & Tr.	... Swabey v. Tristram's Reports.
Taunt.	... Taunton's Reports, Common Pleas.
T. R.	... Terms Reports.
Vaugh	... Vaughan's Reports, Common Pleas
Ventr.	... Ventris's Reports, King's Bench.
Vern.	... Vernon's Reports, Chancery.
Ves.	... Vesey's (Junior) Reports, Chancery.
Ves. Sen.	... Vesey's (Senior) Reports, Chancery.
W. R (Eng.)	... English Weekly Reporter.
Y. & O.	... Young and Collyer's Reports.
Y & J.	... Young and Jeevis's Reports, Exchequer.

[cases]

Space for noting down recent Cases.

The Indian Succession Act

Being Act XXXIX Of 1925.

(Received the Assent of the Governor-General
on the 30th September, 1925)

An Act to consolidate the law applicable to intestate and
testamentary succession.*

WHEREAS it is expedient to consolidate the law applicable to intestate and testamentary succession**. It is hereby enacted as follows :—

The Preamble :——The object of the Act is simply to consolidate the law applicable to intestate and testamentary succession (in British India) and not to effect any amendment in the existing law. To consolidate is to collect the statutory law upon a particular subject, and to bring it down to date in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed, *Administrator-General of Bengal v. Premnal*, 22 Cal., 788, P. C. For the effect of consolidating Act, see 33 Cal. 927—3 C. L. J. 67 ; 29 Cal. 707, P. C. ; 2 Smith's L. C. 10th Ed., 713.

The following Acts have been consolidated herein :—

1. The Succession (Property Protection) Act, (XIX of 1841).
2. The Indian Succession Act, (X of 1865).
3. The Parsi Intestate Succession Act, (XXI of 1865).
4. The Hindu Wills Act, (XXI of 1870).
5. The Married Women's Property Act, (III of 1874), only the last paragraph of sec. 2.
6. The Probate and Administration Act, (V of 1881).
7. The District Delegates Act (VI of 1881).
8. The Probate and Administration Act (VI of 1889).

*In the respective places in the "Long Title" and in the "Preamble" marked with asterisks, formerly occurred the words, "in British India", which were changed into "the Provinces of India" by the Adaptation of Laws Order of 1949. Ultimately the words, "the Provinces of India" even were omitted by the Adaptation of Laws Order, 1950.

9. The Succession Certificate Act (VII of 1889).
10. The Probate and Administration Act (II of 1890).
11. The Native Christian Administration of Estates Act (VII of 1901).
12. The Probate and Administration Act (VIII of 1908).

It may be mentioned here that for obvious reasons, the following Acts have not been included in this statute : (1) The Hindu Disposition of Property Act, 1916 ; (2) The Special Marriage Act (special rules of succession contained therein); (3) The Wills Act, 1838 ; (4) The Inheritance Act, 1839 ; (5) The Legal Representatives Suits Act, 1855 ; (6) The Oudh Estates Act, 1869 ; (7) The Malabar Wills Act, 1898 ; (8) The Bombay Regulation VII of 1827.

There is no question of *succession*, when the Government takes a property by escheat ; therefore, the Act will not apply when the Government obtains a property by such escheat, *Secretary of State v. Girdhari Lal*, 54 All. 226 - 1932 A.L.J. 150 - A.I.R. 1932 A.L.J. 150 = A.I.R. 1932 All. 220 - 136 I.C. 565. It should be noticed that there are no words in the Act, as it now stands, limiting its operation to British subjects as opposed to foreigners, *Amar Singh*, 97 P.L.R. 502 = A.I.R. 1936 Lah. 646 - 160 I.C. 531.

Interpretation of the Act: This being a *positive* enactment of the Indian Legislature, the proper course for interpreting it is to examine its language and to ascertain the meaning thereof without being influenced by any consideration derived from the previous state of the law, or of the English law upon which the present statute might have been based, *Ramanandi Kuer v. Kalawati Kuer*, 55 I. A. 18 - 7 Pat. 221 - 92 C. W. N. 402 - 47 C. L. J. 171 - 54 M. L. J. 281 - 90 Bom. L. R. 227 - 26 A. L. J. 385 - A.I.R. 1928 P.C. 2 - 107 I.C. 14 (P. C.). In interpreting the provisions of the Act, one guiding principle should not be lost sight of, namely, that the rules of interpretation of wills are not the same as those for the interpretation of statutes, *Ali Raza Khan v. Naurzish Ali Khan*, 19 Luck. 109 - 1943 O.W.N. 50 = A.I.R. 1943 Oudh. 243 - 206 I. C. 7. The cardinal rule of construction of statutory language is to read them literally and in its ordinary grammatical sense, see 1955 S.C.A. 440 - 1955 S.O.J. 371 = A.I.R. 1955 S.C. 876 ; 1955 S.C.A. 685 - 1955 S.O.J. 159 = A.I.R. 1955 S.C. 67 ; Cf. 1955 S.C.J. 797 = A.I.R. 1955 S.C. 880 [literal meaning may not be followed if it leads to absurdity]. As to the usefulness of the rules formulated for construction of English documents for the purpose of construing Indian documents, read *Nisar Ali Khan v. Mahomed Ali Khan*, 59 I. A. 268 - 7 Luck. 324 - 9 O.W.N. 614 - 56 C.L.J. 36 - 86 C. W. N. 937 - 1932 A.L.J. 691 - 34 Bom. L.R. 1299 - 63 M.L.J. 386 = A.I.R. 1932 P.C. 172 - 187 I.C. 559 (P.C.). The Provisions of the Act should be construed without reference to the previous state of the law or to the rules of English law, *Gadodia v. Baghubar Dayal*, A.I.R. 1931 Lah. 746 - 188 I. C. 286.

Reference to Preamble in Construing Statutes:—A pre-amble cannot be called in aid to restrict or cut down the express provisions in a statute, *Sutton v. Sutton*, 22 Ch. D. 511 (520); *Q. E. v. Indrajit*, 11 All., 262; or to extend them, *Kadir Baksh v. Bhawani*, 14 All. 145; *Manilal v. Improvement Trustees*, 45 Cal. 848: 27 O. L. J. 1: 23 O.W.N. 1 (F.B.); *vide also* 18 O.L.J. 187; 20 O.W.N. 1158; 8 M.L.J. 724 (P.O.).

Object of the Act:—The object is to *consolidate* the Indian law relating to succession. The separate existence on the Statute Book of a number of large and important enactments renders the present law difficult of ascertainment. That is the justification for the present Act. It being purely a consolidating measure, no intentional change of the law has been made, *Statement of Object's and Reasons, ante.*

Extent of application:—Unlike the other statutes this Act does not specify in one section the total extent of its application. This Act consolidates so many diverse statutes with such varied application that the Legislature has not found it convenient to define extent of the Act at one place, but has enacted a number of sections showing the limitations and qualifications subject whereto the Act is to be applied part by part. Reference, for instance, can be made to the sections 29, 58 and 217, which provide the limitations or qualifications subject to which the parts relating to intestate or testamentary succession, grant of probate, administration of the deceased's estate, apply. Cf. also sec. 3. But this scattered fashion of notifying the extent of application of the Act has rendered the law not easily ascertainable, and considerable difficulty will be experienced in that respect.

How to interpret the Legislative Techniques: The Title of an Act may be resorted to for the purpose of explaining a doubtful clause in it. 8 W. L. 402; F.B. Formerly, there was no title to an Act of Parliament as then it was virtually a petition by the subject with the King's answer on it and consequently the Titles in the old Acts, which were inserted by the Judges in the Judges' version of the statute were considered to be no part of the Acts. The system of prefacing a statute with a title was subsequently introduced and now the title of an Act is a part of it. This historical change in the frame work of statute law has been indicated by Lindley, M.R. in *Fielding v. Morley Corporation*, (1899) 1 Ch. 1; also read 1898 A. C. 210. It may be pointed out here that the title of Act is divided into two parts—one is called the *long title* (see the words in Italics over the Pre-amble), and the other one is called *short title*, for which see sec. 1, post. Read the Article "Title of an Act" in V Legal Miscellany, p. 107. The Marginal Notes of the diverse sections of the Act are intended merely to indicate their object: they are simply *temporanea exposita* of the sections and form no parts thereof, and therefore they cannot be looked into for the purpose of construing the same, 81 I.A. 132—26 All. 393—8 O.W.N. 699 (705). P.O.; (1934) 1 K.B. 590; 41 O.L.J. 45.

As to how far the Headings of Chapters, or groups of sections may be taken into consideration in interpreting the provisions of an Act, see 44 Cal. 267 = 20 C.W.N. 1097, also 34 Bom. 316 (1917) Pat. 318 = 42 I.C. 177. With respect to this matter, Mr. Justice Baron Channel has thus observed, in *Eastern Counties v. Marriage*, (1860) 9 H.L.C. 31 (40): "These various headings are, not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself: They may be read, not only as explaining the sections which immediately follow them, as a Pre-amble to a statute may be looked to, to explain its enactments, but as affording as it appears to me a better key to the construction of the sections which follow than might be afforded by a mere Pre-amble". It should however, be remembered that such headings, should never be preseend, into a constructive limitation upon the exercise of the powers given by the express words of the sections, *Abdul Rahim v. Municipal Commissioners of Bombay*, 45 I.A. 125 = 42 Bom. 462 = 23 C.W.N. 110 = 48 I.C. 63 (P.C.). The Schedules are taken as a part of the statute itself, *Lal Bala v. Anad Shah*, 29 C.L.J. 165 = 23 C.W.N. 283 (P.C.); but they cannot override the plain meaning of the sections themselves 7 Cal. 133 (185); *Mahomed Syedol v. Yehool Gark*, (1916) 2 A.C. 575 = 43 I.A. 256 = 21 C.W.N. 267 (P.C.), *Satish Chandra v. Ramdayal*, 83 C.L.J. 94 = 24 C.W.N. 982; 30 C.W.N. 334; A.I.R. 1926 Cal. 638.

A Proviso should be read along with the substantive part of the section to which it is a supplementing condition [*Maha Prasad v. Ramani Mohan*, 41 I.A. 197 = 42 Cal. 116 = 20 C.L.J. 231, P.C.], but it cannot extend the meaning of that substantive provision of the Act; therefore, arguments from a proviso which seek to extend the operative effect of the substantive enactment are not legitimate unless there is real ambiguity in the substantive enactment, 53 Cal. 492 = A.I.R. 1926 Oml. 927—following *West Derby Union v. Metropoliton L. A. C.* 1897 A.C. 617. In this connection read also 88 C.L.J. 283, but with some caution, because it has refused to vivisect a proviso, even where the proviso by reasons of its own terms renders the limitation or condition enacted by it inapplicable or inoperative. As to how far the Legislative Papers or the proceedings in Council indicating the history, or the early state, of the law can be referred to, see I.L.R. (1938) 1 Cal. 607 = 42 C.W.N. 38; I.L.R. (1941) 1 Cal. 499 = 73 C.L.J. 344 = 45 C.W.N. 526; also read a very learned Article in 43 C.W.N. cxiv (114).

Law under the Act compared with English Law: As seen above, the Indian Succession Act of 1865 and the Probate and Administration Act of 1881 have both (along with certain other statutes) been consolidated in the present Act, of 1925. Those two statutes while embodying to a large extent the rules of English Law yet depart from those rules in many particulars. In the progress of the development of the law and practice in testamentary cases, the Indian Legislature

has given also by to the ecclesiastical origin of the jurisdiction of the Courts of England and evolved an independent judicial system of its own intertwining the salient English principles with the indigenous conceptions of the different communities of the country. Therefore, the Indian Law although impressed with the traces of English Law is still a self-contained system, *Ramanandi Kuer v. Kalawati Kuer*, 55 I.A. 18 = 7 Pat. 221 = 47 C.L.J. 171 = &c (P. C.), *supra*. Questions of probate law and procedure in India should be determined on an examination of the language of this Act uninfluenced by any consideration of the previous state of the law or the English law upon which this enactment is founded, *Gadodia v. Rughubar Dayal*, A.I.R. 1931 Lah. 746 = 133 I.C. 286.

Applicability of the Act to Foreigners: There are no words in the Act as it now stands limiting the Act to British subjects as opposed to foreigners, *Amar Singh v. Sham Singh*, 87 P.L.R. 502 = A.I.R. 1935 Lah. 646.

Date of Operation: "Where any Act of the Governor-General in Council is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor-General,"—See sec. 5(1) of the General Clause Act (Act X of 1897). This Act received the Viceroy's assent on the 30th September, 1925.

Retrospective Effect: This Act seems to have no retrospective effect, i.e., it does not govern wills made before the passing of the Acts consolidated herein. Those wills are to be construed according to justice, equity and good conscience. See *Richard Ross v. Durga Prasad*, 81 All. 239 : 3 I.O. 66; also *Bhimrao v. Punjab Rio*, 18 N.L.J. 1 = 158 I.C. 1042.

PART I.

PRELIMINARY.

1. [Suc. S. 1] This Act may be called the Indian Succession
Short title. Act, 1925.

SHORT TITLE:—The Title of a statute is no part of it and therefore should be excluded from consideration in construing it, see *Hunter v. Nockolds*, I McN. & Gord, 651; but it seems that it can be resorted to to explain a doubtful clause in it. *Hirto Okunder v. Shooro Dhonee*, 9 W.R. 402, F.B.—cited at p. 8, *ante*.

2. [Suc. S. 3] In this Act, unless there is anything repugnant Definitions in the subject or context,—

- (a) "administration" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor;

- (b) "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, *and shall be deemed to form part of the will*;
- (bb) "District Judge" means the judge of a principal Civil Court of original jurisdiction.*
- (c) "executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided;
- (cc) "India" means the territory of India excluding the State of Jammu and Kashmir.
- (d) [Nat. Chris. Act, S. 2] "*Indian Christian* means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion;
- (e) [Pro. S. 3] "minor" means any person *subject to the Indian Majority Act, 1875*, who *has not attained his majority within the meaning of that Act, and any other person* who *has not completed the age of eighteen years*; and "minority" means the status of *any* such person;
- (f) "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator;
- (g) "State" includes any division of India having a Court of the last resort; and
- (h) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

Effect of a Definition Clause:—The terms of a statute should be understood in the senses assigned to them in the definition clause by the Legislature. *Uma Charan v. Ajadunnissa*, 12 Cal. 430(439); *Q. E. v. Ramlal*, 15 All. 141; Cf. *Robert Wigram v. Richard*, 4 M.I.A. 179; when not so defined, they are to be taken in their plain popular meanings, if not inconsistent with the spirit of the Act, *Janki v. Sahebunnissa*, 7 O.C. 74; or in the senses in which they were previously used, *Ruckmaboye v. Lullebhoj*, 5 M.I.A. 284 (250). When the Legislature in its wisdom has left a term undefined, the Court should not lay down a rigid definition for it and thereby crystallise the law, *Krishna Charan v. Sanat Kumar*, 44 Cal. 162(178): 25 C.L.J. 24; 21 C.W.N. 740 : 84 I.C. 609.

*Added by Act xviii of 1929. See 84 C.W.N. xcix (99); 85 C.W.N. 122. The reason for the amendment has been stated in the "Object and Reasons".

Rules of Construction: It must be assumed that the Legislature makes no mistakes, *Commissioners of Income Tax v. Pensee*, (1891) A.C. 631; Plain meaning of language must always be accepted, *Alfred Wilkinson v. Wilkinson*, 47 Rom. 848 : 1928 Bom. 821. Of. 22 Cal. 788 (P.C.); 40 Cal. 483 ; 92 All. 427 (F. B.); technical words are to be understood in a technical sense, *Queen v. Commissioner of Income Tax*, 22 Q.B.D. 286; same words are to be construed in the same sense, *Baba v. Yeshvant, In re*, 35 Bom. 404.

The grammatical sense of words is to be accepted if not leading to absurdity, *Grey v. Person*, 6 H.L.C. 61; *Mahadeb v. Chairman, Howrah Municipality*, 11 C.L.J. 524; *Promotha Nath v. Kaliprosanna*, 28 Cal., 744; the meaning of an Act should be gathered from the language of the Act alone, *Gurubullab v. Mohan Lal*, 7 Del. 127; as to the principle of application of equity, justice, and good conscience, see *Hukum Chand v. Kamalanand*, 33 C.L.J. 927 : 8 C.L.J. 67. The words of an Act should be construed so as to further and not to restrict the purpose of the Act, *Molla Ataul Huq v. Chairman, Matirkotla Municipality*, 24 C.W.N. 969 : 67 I.C. 960; Speeches and proceedings in the Legislative Councils can not be referred to, *Sarat Sundari v. Uma Prosad*, 8 C.W.N. 678; *Dina Nath v. Raja Sati Prasad*, 27 C.W.N. 115 : 36 C.L.J. 220; as to how far reference to marginal notes is permissible see *Thakurain v. Rai Jagat Pal*, 8 C.W.N. 699 (706); *Sheik Chaman v. Emperor*, (1919) Pat. 463; if headings of sections can be considered, *In re Shiu Lal*, 34 Bom., 316; *Janki Singh v. Jagannath*, (1917) Pat. 318. Cf. *Abdul Rahim v. Municipal Commissioners of Bombay*, 42 Bom., 462 : 23 C.W.N. 110 : 48 I.C. 63 (P.C.); Illustrations are to be considered as part of the statute itself, *Lal Bala v. Ahad Shah*, 23 C.W.N. 283 : 29 C.L.J. 165 : 35 M.L.J. 614 : 48 I.C. 1 (P.C.); *Satish Chandra v. Ramdayal*, 24 C.W.N. 982 : 32 C.L.J. 94; *Ram Subag v. Emperor*, 19 C.W.N. 972. Read notes at p. 3, ante.

N. B.—"The General Clauses Act (Act X of 1897) will apply to the Bill. The definitions therefore of "person," "year," "month," "immoveable property," "moveable property," "Local Government" and "High Court" are unnecessary and are omitted. The definitions of "British India" and "District Judge" have also been omitted as the definitions in the General Clauses Act appear more suitable and do not change the substance of the law"—Notes on Clauses circulated with the Bill.

Means and includes: It is worthy of notice that in some of the clauses of this section, the word, "means" has been used, and in others the word, "includes" occurs. Where in an interpretation clause, the word, "includes" is used, it is to be understood that the term defined is intended to retain its ordinary meaning, and the Legislature simply widens its scope by specific mention of certain matters which its ordinary meaning may, or may not com-

prise, *Official Assignee v. Firm of Chandulal*, A. I. R. 1924 Sind, 69-76 I. C. 657. The Legislature uses the word, "means," where it wants to exhaust the significance of the term defined [see *Q. E. v. Ramanjiyya*, 2 Mad. 5 (7); *Q. E. v. Asutosh*, 4 Cal. 488 (F.B.), and the word, "includes" where it simply desires the definition to be only enumerative and not exhaustive; read in this connection, *Balvantrao v. Puroshotam*, 9 Bom. H. C. R. 99 (106); also *Rodger v. Harrison* (1898) 1 Q. B. 167 (171).

(a) **Administrator** is appointed when there is no executor. After the grant the office and powers of an Administrator are mostly the same as those of an executor, Touc. p. 474; *Black-borough v. Davis*, 1 P. Wms. 43. Compare the definition of the term given in the Act with those given in *Sheppard's Touchstone* (Touch. 401) and Toller's Executor (p. 108).

(b) **Codicil**:—The term comes from the words *codicillus* (diminutive of a testament) and *codex* (a little book or writing). For Blackstone's definition of the term, see 2 Black, 450, and for that of Domat see 2 Domat, 263, 266. The codicil is a subsidiary will. It serves to interpret the language of the will, *In re Ven; Lindan v. Ingram*, (1904) 2 Ch. 52; and to control the will if its language is doubtful, *Chukkun Lal v. Lalit Mohan*, 20 Cal. 906, citing *Sherrat v. Oakley*, 7 T. R. 492; Cf. *Niranjan v. Dam Das*, 112 P.W.R. 1916: 35 I.C. 899. The codicil can also alter or add to the will, but when it does not supersede an earlier will, the latter remains in tact, *Administrator of Bengal v. Hughes*, 40 Cal. 192. The clauses of a will which have been removed by a codicil cannot be looked into or be regarded as expressive of the testator's intentions, *Choa v. Choa* 1928 A.C. 469. A codicil is made in relation to a will and therefore presupposes the making of a will. It is deemed to form part of the will; that perhaps means that it forms a part of the testamentary disposition, though not necessarily a part of the instrument itself. Cf. *Lindan v. Ingram, supra*; *Townley v. Townley*, (1884) 50 L. T. 394; *Sherer v. Bishop*, 4 Bro C.C. 65. In England, prior to the English Wills Act, (1 Vict. Cl. 26), a codicil was regarded as dependent on the will and therefore a revocation of the will was an implied revocation of the codicil (*Grimwood v. Cozens*, 2 Sw. & Tr. 364), but under sec. 20 of that English statute, a codicil is not revoked by the revocation of the will, *In the Goods of Savage*, L.R. 2 P. & D. 78; *In the Goods of Turner*, L.R. 2 P. & D. 403; this also is the law in India, Cf. sec. 70 of this Act which corresponds with sec. 20 aforesaid. Under the English Wills Act, 1837, the effect of a codicil is to bring a will down to its own date, *Gooe Wardene v. Goonewardene*, 1931 A.C. 647-61 M.L.J. 340-A I.R. 1931 P.C. 307-134 I.C. 1074 (P.C.). As to when, and when not, a codicil can be probated read *Cyril v. D'Almeida*, 1940 Rang L.R. 654-A I.R. 1941 Rang, 83-192 I.C. 690. A codicil may be written on the same paper as the will or on separate paper, *Aaron v. Aaron*, 8 De G. & Sm.

A document may take effect as a codicil although it contains no reference to the will itself, *Ramdulari v. Bishweshwar Dayal*, A.I.R. 1928 Nag. 105=69 I.C. 876. As to what will happen if the document to which it refers is incapable of identification, *Knight v. Briggs*, (1925) Ch. 179.

[N. B.—The last few words in italics have been transferred here from old sec. 69 (now sec. 82)].

(bb) **District Judge**: The judge of a principal Civil Court of original jurisdiction [including the High Court in its Original Side; see *Maniklal v. Hiralal*, 64 C.W.N. 225=A.I.R. 1950 Cal. 377.] will be regarded as a District Judge for the purposes of this Act. [*Manubhai Chunlal v. General Accident Fire & Life Assurance Corp.*, 60 Bom. 1027=38 Bom. L. R. 632=A.I.R. 1936 Bom. 363=165 I.C. 672]. The present definition has been added by the Amending Act xviii of 1929. The history of this amendment has been well commented on in an Article published in 34 C.W.N. xcix (99), which please read; the effect of the present amendment is to enable the High Court (in its Original Side), to issue succession certificates, *Re Bhola nath Pal*, 58 Cal. 801=35 C.W.N. 122=A.I.R. 1931 Cal. 580=134 I.C. 1279; *Re Aroona Chellam*, 9 Rang. 205=A.I.R. 1931 Rang. 281=135 I.C. 80; *Re Kuppuswami Nayagar*, 59 Mad. 237=59 M.L.J. 17=A.I.R. 1930 Mad. 779. But see *Re Rajendra Chandra Sen Gupta*, 57 All. 302=1934 A.L.J. 800=A.I.R. 1934 All. 958=152 I.C. 825. The term "District Judge" as defined in this clause, does not include a Judge of the High Court at Patna, and the Patna High Court will have no jurisdiction to grant succession certificates under Part X of the Act. This is so because no original civil jurisdiction has been conferred on that High Court by the Letters Patent, and that High Court can on no ground be treated as a principal Civil Court of original jurisdictions, S. K. Roy *In re* 27 Pat. 18=A.I.R. 1949 Pat. 318. For the position of the Nagpur High Court, read *Vishnu Murlidhar, In re*, 1944 N.L.J. 264; for that of the Allahabad Court, read *Rajendra Ch. Sen Gupta, In re*, 57 All. 302=1934 A.L.J. 800=A.I.R. 1934 All. 958=152 I.C. 825; read also the notes under the heading, "District Judge" under sec. 371, post.

The term "District Judge" as used here being made a principal Civil Court is not a *persona designata*, and therefore when a District Judge by virtue of his powers under the Civil Courts Act assigns his works to an Additional District Judge, such latter judiciary also will be a District Judge for the purposes of this clause, *Ganpat v. Mohaden*, 4 D.L.R. (Nag.) 166=1949 N.L.J. 451=A.I.R. 1949 Nag. 408.

Calcutta City Civil Court: Section 2(bb) has been amended by the addition of the following Proviso to it, by the Calcutta City Civil Court Act, 1958.

"Provided that as respects the area comprised within the local limits for the time being of the ordinary original civil Jurisdiction of the High Court at Calcutta, references in Part X and Schedule viii of this Act to a District Judge shall be construed as references to the City Civil Court, established under the City Civil Court Act, 1958.

Part X and Schedule viii of this Act deal with succession certificates and extended succession certificates. Therefore, within the original side jurisdiction of the High Court at Calcutta, the expression "District judge" as used in this sec. 2(bb) will mean the City Civil Court of Calcutta (established by the W. B. Act xxi of 1953).

(c) **Executor** :—The definition has been taken from Blackstone (2 Blackstone's Com. p. 303). Cf. Wms. 230 (8th Ed.); Sheppard's Touchstone, p. 400. An executor can be appointed only by the testator, but his appointment may be *express* or *implied*, see sec. 222 (2). In order to make a person an executor, the execution of the will *must be confided to him*. So a trustee named in a will is not necessarily an executor, *Burada Prasad v. Gajendra Nath*, 13 C.W.N. 557 : 9 C.L.J. 383. Cf. *Hara Coomar v. Dorgamone*, 21 Cal. 196 (199). A person authorised to receive and pay the debts of the testator and to get in all the personal estate is an executor. Cf. In the goods of *Baylis*, 2 Sw. & Tr. 613; *In re Monohur Mookherjee*, 5 Cal. 756—distinguished in *Ladhanani v. Sibhag Rani*, 9 Lab. L.T. 152=28 P.L.R. 220=A.I.R. 1927 Lah. 770=102 I.C. 194. The executor of an executor is not a derivative executor of the original testator, *De Souza v. Secretary of State*, 12 B.L.R. 423. So, where an executor dies without proving the will, the executorship altogether terminates and is not transmitted to the executor of the deceased executor as a derivative executor of the original testator, *Nathuram v. Alliance Bank of Simla Ltd.*, 30 P.L.R. 236=A.I.R. 1929 Lah. 646=116 I.C. 558. For further notes, see under secs. 211 & 222, *post*.

(d) **Indian Christian** :— "This definition is taken from the Native Christian Administration of Estates Act, (Act VII of 1901), except that the phrase "Indian Christian" has been used instead of "Native Christian" following the modern practice in this respect"—Notes on Clauses to the Bill. In order to come under this definition the person must be or *bona fide* claim to be, of unmixed Asiatic descent and must profess Christianity (no matter, whatever form of it). Remember that it is the outward profession and not the inward conviction that counts in determining a man's religion, *Ma Khin Than v. Mi Ahma*, 12 Rang. 184=A.I.R. 1934 Rang. 72=149 I.C. 1148. Where converts to Christianity have thoroughly abandoned all connection with Hindu society and manners and there is no proof of local custom overriding the Act, this Act will apply, *Mukherji v. Alfred*, 36 P.R. 1909 : 1 I.C. 697; *Kamawati*

v. *Digbijai*, 48 All. 525 : 15 L.W. 1 (P.C.) ; also *Dagres v. Pacotti*, 19 Bom. 783. Cf. *Abraham v. Abraham*, 9 M.I.A. 195; *Dwarkanah v. Raj Rani*, 8 O.W.N. 198-184 I.O. 872 ; and consult the notes under the heading, "Hindu Convert to Christianity" under sec. 29, post.

(e) **Minor and Minority** : This definition agrees with the definition in the Oudh Estate's Act (1 of 1869). Compare also the definitions in the repealed Probate and Administration Act (Act V of 1881) and the present Guardians and Wards Act (VIII of 1890) : The Definition means that a minor is *primarily* a person who has not attained majority under the Indian Majority Act, (sec. 3). But this Act only defines the age of majority of persons *domiciled* in British India, and therefore it was necessary to add in the definition the words "any other person who has not completed the age of eighteen years" in order to include persons not domiciled in British India (whether they be aliens or foreigners), see *In the goods of Sew Narain Mohata*, 21 Cal. 911. *Vide* also the notes under secs. 223 and 236 post. Under sec. 4 of the Indian Majority Act, in computing age, the day on which a person is born is included ; but as this Act does not apply to non-domiciles, in their case, the date of birth is to be excluded. Under the Indian Majority Act the effect of appointment of a guardian is to prolong the minority to the age of 21 and subsequent removal of the guardian, whether by death or discharge does not shift back the minority to the shorter period of 18 years, Cf. *Rudri Prokas v. Bholanath*, 12 Cal. 612 ; *Jaraomul v. Mahadeo*, 86 Cal. 768 ; *Harshav v. Baba*, 5 Pat. L. J. 460 : 57 I. C. 883 ; *Goods of Effie Jessie*, 28 O.W.N. 627 : 81 I. C. 1008 : A.I.R. 1924 Cal. 644.

(f) **Probate** : Compare with this definition the definitions given in William's *Executor*, p. 297 (8th Ed.) and in 2 Black. 426. The definition makes it clear that a *certified and sealed copy of the will together with the grant makes a Probate*. A mere copy of the grant without a certified and sealed copy of the will annexed is not a "probate," *Dilaney v. Rohamat Ali*, 32 Cal. 710. For the form of the will, *vide* sec 289, post and Schedule VI. Probate can be granted only to an executor, *Bohary Lall v. Juggo Mohan*, 4 Cal. 1. As to the effect of a probate, see sec. 273, post.

(g) **State** — It was at one time decided that Assam did not come within the definition of a Province, (now State) but of a District for the purposes of this Act, *Thukor Kristo v. Basudeb Ghoshmee*, 12 W.R. 424. When the Bill was circulated this definition was proposed to be omitted as it was thought that such omission would lead to no administrative inconvenience because the definition of the term in the General Clauses Act could do without involving any change of Law. In that Act Province means the territories for the time being administered by any Local Government ; so according to it now Assam wil be

a province and therefore there will be a change of law. For this reason the above definition has been retained in the Act. See Notes on Clauses, cl. 2.

(h) Will.—The whole conception of will is derived from the Roman Law. "It is a disposition of property which can have no legal effect until the death of the person who executes such disposition, and it is further a disposition which can be altered, revoked or added to at any time before the death of the person in question. It follows therefore that a will is disposition of property which from its inception is *ambulatory*"; see Henderson's Indian Succession Act, 4th Ed., p. 8. Their Lordships of the Judicial Committee thus speak of a will in *Tagore v. Tagore*, "such a disposition of property to take effect upon the death of the donor, though revocable in his life time, is until revocation a *continuous act of gift* up to the moment of death, and does not then operate to give the property disposed of to the persons designated as beneficiaries" Swinburne describes it as "the first sentence of our will touching that which we would have done after our death," see Wms. 6. The Terms "will," "last will" "testament" and "Last will and Testament" are all synonymous, *Lord Walpole v. Earl of Cholmondeley*, 7 T. R. 138.

We have seen above that the main characteristic of a will is that during the life-time of the testator it is merely *ambulatory*, that is, of an unsettled and fluctuating character, and revocable, Its nature and characteristics.

Siba Koer v. Deonath Sahay, 8 C.W.N. 614; *Chattri Kumari v. Mohan Bikram Shah*, A. I. R. 1931 Pat. 114=121 I.C. 387, and this ambulatory character prevents it from being cancelled by a suit during the testator's life time, *Rambhajan Kunwar v. Gurcharan*, 27 All. 14; read the notes under sec. 62 post; As a will does not attain to a settled character till the last moment of the testator's death, the last pronouncement always prevails in testaments, whereas in grants the *first* is of the greatest force, see Touch. 402. Vide also sec. 68, infra.

The declaration of intention referred to in the clause may be written or unwritten.

Kinds of Will.

A testament by word and without writing is a *nuncupative*

Nuncupative Will.

testament and is made by an oral declaration before a sufficient number of witnesses

It is also called *verbal* testament or a *nuncupatory* testament. Cf. *Upendra Krishna v. Nobin Krishna* 8 B.L.R.O.C. 113. The nuncupative wills used to be recognised prior to the Indian Succession Act, but now they are allowed to the extent provided by sec. 60, post. See the following cases, *Hari Chintaman v. Moro Lakshman*, 11 Bom. 89; *Subbayya v. Surayya*, 10 Mad. 251; *Kalian Singh v. Siwal Singh*, 7 All. 163; *Beer Persab v. Rajendra Persab*, 12 M.I.A. 1; *Narain v. Govindo*, 85 P.W.R. 1918=45 J.C. 183; *Bahader v. Pragdutt*, 41 All. 492: 17 A.L.J. 765: 60 I.C. 935. The person relying on such a will must prove the actual words used in making it and its time and place, *Beer Persab's case, supra*; *Secretary of State v. Shama*, 6

Iv-G. 210 (All). Such will may be admitted to probate, *In re Martambai*, 24 Bom 8; *Masab Ali v. Collector of Cuttack*, 7 A. L. J. 45. The Act also classifies the will into (1) unprivileged and (2) privileged. The first form is in writing and is subject to observation of certain formalities, and is known as the ordinary form, see sec. 68, *infra*. The second, that is, the privileged will may be in writing without the strict formalities or be made by word of mouth, see sec. 66, *infra*. There are certain other varieties of wills, e.g.—(a) a *holograph* will which is entirely in the handwriting of the testator, see *Ramdas v. Muthusami*, 16 Mad 380; *Goods of Elliot*, 4 Cal. 106; *Goods of Conjan*, 25 Cal. 65; *Santassi Dasi v. Narendra Nath Pal*, 66 Cal. 55—A. I. R. 1929 Cal. 390—121 I. C. 570. Also see. 66(2)(a) *post*; (b) *Mutual* or *Reciprocal* will, (c) *Joint* will, (d) *Inofficious* will, that is, a will inconsistent with the testator's natural affection and moral duties. In case of such a will the Court will demand a very strong proof, see *Sarada Govardhan v. Nuddern Mohun*, 24 W. R. 162; *Dulhin Genda v. Haronandan*, 80 M. L. J. 824, 33 I. C. 790, P. C., (e) *conditional* will, (f) *contingent* will. For instances of these kinds, see *Elmons n v. Edmonson*, 5 Q. W. N. clxxviii (178) and *Shipwith v. Cobell* 19 Gratt. 158 (182), *Farsons v. Lanoe*, 1 Ves. Sr 189.

It will be seen from the definition, that the very essence of a will is that it should be carried into effect after the death of the testator, Tests of a Will [Krishna Kumari v. Rajendra Bahadur, 56 I. A. 156=4 Luck 122=57 M. L. J. 496=80 M. L. W. 801=6 O. W. N. 1296=1929 A. L. J. 686=A. I. R. 1929 P. C. 121=116 I. C. 397 (P. C.)—the will speaks from the time of the testator's death], and in this respect it materially differs from a grant or a settlement. Making another person an owner of the property of the executant of a document after his death, constitutes a will, *Shiam Pratap v. Bairagi Madho*, A. I. R. 1940 All. 363=189 I. C. 767; *Dumodara Moorthi v. Amma Amma*, (1943) 2 M. L. J. 332=1943 M. W. N. 554=A. I. R. 1944 Mad. 22=211 I. C. 288. A will taking effect after the death of the testator, its provisions are not in present and therefore words used in present tense in it are to be taken as equivalent to words of futurity; but this rule should not be applied in disregard of the plain-meaning rule of construction of language, and the effect of this may be that the gift instead of being testamentary will be one *inter vivos*, *Rajeshwari Kuer v. Khukhra Kuer*, 48 C. W. N. 73—I. L. R. (1948) Kar. (P. C.) 117=46 Bom. L. R. 609=(1948) 2 M. L. J. 168=A. I. R. 1948 P. C. 121=209 I. C. 408, P. C. Its other characteristic is that it is alterable and revocable (vide the definition of 'codicil' above). So, in order to determine whether an instrument is a will or not we are to see whether the formalities of secs 68 and 66 have been complied with, and subject to that, whether it is revocable and operative on the death of the executant. Cf. *Thaker Isht Singh v. Thakur Baldeo*, 10 Cal 792 (P. C.); *Parekh v. Gurappa*, 89 Bom. 227. An instrument does not lose its testamentary character simply because it recites that it is irrevocable; only the restricting condition is void and the instrument is revocable, *Sagar Chandra v. Dwarka*

nath, 14 O. W. N. 174 : 10 C. L. J. 644 : 3 I. C. 880, or in other words, "revocability" follows as a matter of course notwithstanding the testator says anything to the contrary. *Din Tarini v. Krishna Gopal*, 86 Cal. 149; *Sita Koer v. Munshi Deonath*, 8 C.W.N. 614; *Rammani Dasi v. Ram Gopal*, 12 C.W.N. 942; applying the above tests, testamentary character of documents was determined in the following cases, *Rajendra v. Jogendra*, 14 M.I.A. 67; *Rammoni Dasi v. Ram Gopal*, 12 C.W.N. 942; *Lali v. Murlidhar*, 28 All. 488 (a case of *Wajib-ul-urz*); *Kotayya v. Vara Dhamma*, 59 M. L. J. 461 = A. I. R. 1930 Mad. 744 = 127 I. C. 619—following *Rajammal v. Anthiammal*, 33 Mad 304. Cf. 19 All. 16. In determining whether a document is a testament or not we are to look to its substance and not to its form or name, *Lakshmi v. Subramanya*, 12 Mad. 490. Cf. *Din Tarini's* case, *supra*. Any form or particular language is not essential, *Ibid*; *Re Coyler*, 14 P.D. 48; the substance of the transaction being always taken as a guide, *Rambhat v. Lakshman*, 5 Bom. 6.0. When the testamentary character of a document is in controversy, the Court should determine the question, *Umrao Singh v. Lachman Singh*, 83 All. 344, P.C. In order to enable the Court to adjudge an instrument to be of a testamentary character, there must always be some cogent reason, *Mahadeva v. Sankarlu*, 18 M.I.J. 450. Cf. *Udai Raj v. Bhagwan*, 37 I. A. 46; 82 All. 227. A document purporting to be a will, but not operating as such, may be operative for other purposes, e.g. for the purpose of authorising adoption, *Kondapalli v. Mandapaka*, 62 I. A. 305 = 48 = Mad. 614 = 30 C.W.N. 193 = 42 C.L.J. 88 : 49 M.I.J. 247 = A. I. R. 1925 P.C. 196 = 89 I. C. 783, P.C. A document which takes effect immediately is a non-testamentary one, *Thakoor Umrao v. Thakoor Lal Singh*, 13 C.L.J. 579 ; Cf. *Chaitanya v. Doyal Adhikari*, 32 Cal. 1082 : 9 C.W.N. 1021; *Bhoobun Meyee v. Ram Kishore Acharya*, 10 M. I. A. 279; *Somasundara v. Durai Sami*, 27 Mad. 30; *Mehunt Bhagnban v. Mehunt Raghuandan*, 23 I.A. 94 : 22 Cal. 843. That is, where the disposition is *in presentis* or *inter vivos*, there is no will, *Rajeswari Kuer v. Khukna Kuer*, 48 C.W.N. 73 = &c. (P.C.), *supra*. A dedication by which the grantor appointed himself as the manager and provided that upon his death his disciple was to become the manager is not a will as the disposition does not take effect after his death but becomes operative during his life time, *Mohunt Sukhdeo v. Keshwar*, 1 Pat. L.T. 457. For other cases as to whether a deed is a will or not, see 11 Cal. 463 (P.C.) ; 12 Mad. 490 ; 22 W. R. 409 ; 7 All. 163 ; 24 W. R. 395 ; 27 All. 14 ; 5 All. 313 ; 21 All. 91 ; 17 M.I.A. 82 ; 38 Bom. 227 ; 24 Bom. 8 ; 28 All. 488. A document which contains a legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death, will be regarded as a will although it has the appearance of a family arrangement also, *Ramchandra v. Ramabai*, 89 Bom. J.R. 186 = A.I.R. 1987 Bom. 341 = 170 I. C. 960. An instrument is not necessarily testamentary simply because actual enjoyment under it is postponed till the testator's death. If it has the present effect in fixing the terms of future enjoyment which is not dependent on the testator's death for consummation, it is not a will, Cf. *Rajammal v. Anthiammal*, 33 Mad 304; *In re reference by Collector*, 20 Bom. 210, F. B.; such instruments

are mostly settlements. For cases showing contrast between will and settlements, see *In re Abdulla Hujee*, 95 Bom. 446; *In re Sameshur Dutt*, 87 All. 264; also 87 All. 169, P.B.; 21 Mad. 422; *Damodara Moorthi v. Ammu Amma*, (1943) 2 M.L.J. 332-(1943) M.W.N. 554=A.I.R. 1942 Mad. 22=211 I.C. 288; *Ranbir Chand v. Jodha Mal*, 86 P.L.R. 71=A.I.R. 1934 Lah, 764=150 I.C. 311. Disposition of future acquired property is more consistent with the testamentary character of the document than its being a settlement, *Pasungilla Pillai v. Isakkumuthu Pillai*, A.I.R. 1928 Mad. 349=111 I.C. 22. A transaction failing as a will may take effect as a family settlement. This mostly happens in cases of devises of Mitakshara property with the consent of the remaining coparceners, *Venkoba Sah v. Ranganayaki Ammal*, 71 M.L.J. 454=1936 M.W.N. 781=A.I.R. 1936 Mad. 967=168 I.C. 325. Where the deceased made no bequest but directed his wife to effect partition of his estate among his sons at a distant date after his death, it was no will, *Peorenra Nath v. Hemangini*, 86 Cal. 75; Cf. *Kishori Mohan v. Moni Mohan*, 12 Cal. 166. The mere fact that a trust-deed was mentioned as part of the grant of letters of administration or that the deed contained a provision for the appointment of a future trustee would not make the disposition a testamentary one, *Umacharan Bose v. Rakhal Das*, 46 C.L.J. 145=A.I.R. 1927 Cal. 756=105 I.C. 12. A mere direction to sell property without any devise simply passes a power, *Elizabeth May v. Bhupendra Nath* B sc. 7 Pat. 520=A.I.R. 1928 Pat. 304=111 I.C. 57. A will does not lose its testamentary character simply by reason of the fact that its provisions have mainly adhered to the rules applicable on intestacy, *Ma Khatun v. Ma Bi Bi*, A.I.R. 1933 Rang. 393=149 I.C. 654. A provision in the will giving the devisee power to nominate a successor does not destroy the testamentary character of the document, *Abdul Halim v. Sandat Ali Khan*, 1 Luck. C. 738=A.I.R. 1928 Oudh, 155=108 I.C. 817. A draft will may be accepted as evidence of an oral will where the facts show that the testator had expressed his final intention as to the disposition of his property, *Gur Prasad v. Sital Dei*, A.I.R. 1926 Oudh, 342=94 I.C. 796.

A joint will is not unknown to the law, *Rajeswar Misser v. Sukhdeo Misser*, A.I.R. 1947 Pat. 449. Read also the notes under the heading "Joint wills" under sec. 63, post.

An instrument may be partly non-testamentary in so far as it operates *in presenti*, and partly testamentary in so far as it operates *in futuro*, *Chand Mai v. Lachmi Niram* 22 All. 162; *Cross v. Cross*, 8 Q.B. 714; *Samanchi v. Samanchi*, 26 I.C. 363; *In re Komola Kant*, 4 C.L.R. 401 (403); 38 All. 357=17 O.W.N. 449 (P.U.). As to the feasibility of probate being granted in respect of such hybrid documents, *Garib Saw v. Patia Das*, 66 C.L.J. 337=A.I.R. 1938 Cal. 290=175 I.C. 920. As to an instance where a document has been held not to be a will, *Umacharan v. Rakhal Das*, 46 C.L.J. 145=A.I.R. 1927 Cal. 756=105 I.C. 12.

The validity of a will with reference to the devise of any particular property depends upon the testator's statutory or other lawful disposing power over that property at the time of his death, *Krishna Kumari v. Rajendra Bahadur*, 56 I. A. 156-4 Luck. 124-57 M.L.J. 496-30 L.W. 301-27 A.L.J. 686-A.I.R. 1929 P.C. 121-116 I.C. 397, P.C. Therefore, a property which could not be disposed of by a person by an alienation during his life-time cannot form the subject matter of a testamentary disposition. The power of alienation *inter vivos* and the power of

Custom may affect
power of making testa-
mentary disposition

testation go together and where the former is affected by a rule of custom, the latter also will likewise be affected by the same rule, *Fazal Khan v Anwar*, 29 P. L. R. 254-A.I.R. 1928 Lah. 489-110 I.C. 550. Thus, where a tenant has no

transferable interest in respect of his *rayati* holding, he will have no power of testamentary disposition in respect of the same, *Mohesh Chandra v. Mathuranath*, A.I.R. 1928 Cal. 360-112 I.C. 128. Read author's Bengal Tenancy Act, 3rd Ed. p. 260. But where a husband by will gives power to his widow to will away the property after her death, although power of disposal has been denied to her during life-time, the Court held that a will by the widow would be valid although a trust-deed during her life-time would be inoperative, *Ammakauraminal v. Damodar Mudabar*, A.I.R. 1928 Mad. 66-109 I.C. 228.

3. [Suc. S. 332] (1) The State Government may, by notification in the Official Gazette, either retrospec-

Power of State
Government to exempt
any race, sect or tribe
in the State from opera-
tion of Act.

tively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely,

sections 5 to 49, 58 to 191, 212, 213 and 215 to 369,

the members of any race, sect or tribe in the State, or of any part of such race, sect or tribe, to whom the State Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order.

(2) The State Government may, by a like notification, revoke any such order, but not so that the revocation shall have retrospective effect.

(3) [New] Persons exempted under this section or exempted from the operation of any of the provisions of the Indian Succession Act, 1865, under section 332 of that Act are in this Act referred to as "exempted persons".

N. B.—"This has been brought into line with the provisions of sec. 332 of the Ind. Suc. Act, 1865, which operate from the date stated—Notes on Clauses.

Sub.sec. (1) & (2): Power of Government to exempt persons from this Act. This section gives the State Governments a power to exempt the members of any

race, sect or tribe in the province or any part thereof from the operation of certain sections of this Act (secs. 5 to 49, 58 to 191, 212, 213 and 215 to 269), either prospectively or retrospectively from the 16th March, 1865. The order of exemption should be published in the local official Gazette. The State Government will have power to revoke its order of exemption. The order revoking exemption should also be notified in the local official Gazette, but the revocation should not operate retrospectively. See sub-sec. (2). Notification under this section at the appellate stage of a case did not apply where there had already been a decision of Court regarding the rights of the parties, *Tuni Orain v. Leda Orain*, 20 C. W. N. 1082 : 1 Pat. L. J., 225 : 36 I. C. 206.

Sub-sec. 3 : Exempted Persons. Persons exempted under sub-secs. (1) and (2) above and those exempted from the operation of the Indian Succession Act, 1865 by sec. 332 of that Act are called exempted persons in this Act.

The following were exempted persons under said sec. 332 of the Indian Succession Act, 1865 and hence under this Act also.

(1) Native Christians (Indian Christians) in the Province of Coorg exempted retrospectively from the 16th March, 1865—*Gazette of India*, July 25, 1868, p. 1094, [The native Christians residing in the Mysore State having been exempted from the Act by means of the notification of 1868, the Hindu law of Adoption may be applied to them, *Kiritappa v. Aralappa*, 13 Mys. L. J. 802]

(2) Khasias and Syntungs in Assam, similarly exempted—*Gazette of India*, 1877, p. 512.

(3) The Jews in Aden—*Gazette of India* 1877, p. 707.

(4) The following tribes were exempted by notification dated the 23rd June, 1914 :—Santhals, Oraons, Bhunys, Gonds, Garos, Mundas alias Muras, Kharias, Gharias, Mates, Totoos and Malpaharias dwelling in Bengal (Notification No. 940.).

(5) The Act has been held not to apply to Cutchi Memons, *Haji Osman v. Haroon Suleh Mohamed*, 47 Bom. 369 = 24 Bom. L. R. 978 = A. I. R. 1923 Bom. 148 = 68 I. C. 862.

N. B.:—Under sec. 54 of the Administrator-General's Act, (III of 1913), when any person other than an "exempted person" within the meaning of sec. 2 of that Act dies leaving assets within the limits of the jurisdiction of a District, the District Judge is, in the first place, to take charge of the property, and report to Administrator-General. Cf. sec. 64, Act II of 1894 and Act VII of 1901.

N. B.—See the notes on clauses circulated with the Bill, under "clause 3."

PART II.
OF DOMICILE

4. [Suc. S. 331] *This part shall not apply if the deceased was a Hindu, Muhammedan, Buddhist, Sikh or Jaina.*

This part (*i.e.* sec. 4 to 19) does not apply, if the deceased was a Hindu, Mahomedan, Buddhist, Sikh or Jaina. These latter two* have now been included, as formerly there was a controversy about them, see. 31 Cal. 811; 4 Cal. 744; 5 All. 65; 2 Mirl. Dig. 226. Mere profession of Hinduism or Islamism will not do, but the person should actually be a Hindu or a Moslem, *Raj Bahadur v. Bishen Dayal*, 4 All. 343; *Dagres v. Pacott*, 19 Bom., 783; see the author's *Anglo-Mahomedan Law*, 3rd Ed., p. 27. Nowwithstanding the exemption of Hindus under this section they can inherit the property of a Christian, *Administrator-General v. Anandachari*, 9 Mad. 466 (cited under sec. 42, post).

Caste determined with reference to date of Death:—In order to render the bar of this section applicable the deceased should be a Hindu &c. (as the case may be) at the time of his death, *Nepenbula Devi v. Satikanta*, 12 C. L. J. 459; 15 C. W. N. 158. So, where a Hindu subsequently embraced Christianity and died a Christian is not a Hindu within the meaning of this section, see *Ponusami v. Doraisami*, 2 Mad. 209; *Administrator-General v. Anandachari*, 9 Mad. 466; *Tellis v. Saldanha*, 10 Mad. 69; *Lastsngs v. Gonsalves*, 23 Bom. 539; *Dagres v. Pacott*, 19 Bom., 783.

Hindus. Ordinarily the term "Hindu" will be applicable to those who follow the Brahmanical religion. But now the term has been extended to include persons like the Brahmos and other persons who are not completely excommunicated from Hindu society, because of religious tenets and social conduct, (Read J. N. Bhattacharji's *Hindu Law* 2nd Ed., p. 45). For the Brahmos *vide infra*. Broadly speaking, the term "Hindu" has been used in a theological as distinguished from a national or racial sense, *Ratansi v. Administrator-General of Madras*, 62 Mad. 160=55 M.L.J. 478=1928 M.H.N. 848=28 L.W. 674=A I.R. 1928 Mad. 1279=111 I.C. 364. One does not cease to be a Hindu by taking forbidden food, *In re Sirdar Dayal Singh: Jogendra Chandra v. Ram Bhagwan*, 251 P.L.R. 1900. Prostitutes who were Hindus by origin do not cease to be Hindus because of the

* "It is well settled that the word "Hindu" in sec. 331 of the Ind. Suc. Act, 1865 and in section 2 of the Pro. and Admin. Act, 1881 includes Jainas and Sikhs (Cf. 31 Cal. 11 etc.); and as the Hindu Wills Act 1870, which the Bill consolidates, makes special mention of Sikhs and Jains they are separately mentioned throughout the Bill. This and other similar sections may need to be qualified if and when the Special Marriage (Amendment) Bill which has just been passed by the Indian Legislature, becomes law." Notes on Clauses to the Bill,

degradation, *Swarnmoyee v. Secretary of State*, 25 Cal. 254 : 2 C.W.N. 97 ; even native converts, if they so choose, may continue to be governed by Hindu Law, *Lustings v. Gonsalves*, 28 Bom 589. The Cutchi Memons who were originally Hindus but subsequently adopted Islamism are not Hindus within the meaning of this Act, see *Jogendra v. Rambhagwan*, 251 P.L.R. 1900 (*supra*). Cf. *In re Haji Ismail*, 6 Bom. 452; *Mahomed Sidick v. Haji Ahmad*, 10 Rom. 1; *Asha Bai v. Haji Tyeb*, 9 Bom. 115; *Advocate-General v. Jimbabi*, 41 Bom. 181; 17 Bom. L.R. 799; 31 I.C. 106; *J-n Mahomed v. Datu Joffer*, 38 Bom. 449. A Hindu married under the special Marriage Act will still, notwithstanding such marriage, continue to be governed by the Hindu law and not by this Act. *Vidyagauri v. Naran Das*, 80 Bom. L.R. 189 = A.I.R. 1928 Bom. 74 = 108 I.C. 492 As to whether the Sikhs and Jainas are Hindus or not, *vide infra* respectively under those headings. But the old controversy as to whether the Sikhs and Jainas are Hindus or not is now of no importance under this Act, because of their inclusion in the exemption clauses hereof. Of 7 Cal 744 (P.C.); 5 All. 55; 2 Morl Dig. 23. But such inclusion seems to imply that the Legislature has taken them as falling outside the Hindus. The best course would have been if there had been a definition clause saying that the term "Hindus" will include the Sikhs and Jainas. *Vide* the footnote at p. 18 *ante*. A European does not become a Hindu merely by professing theoretical adherence to, or by expressing ardent admiration for, Hinduism. *Katansi v. Administrator-General of Madras*, *supra*. As to whether an European can be regarded as a convert to Hinduism, *vide Ibid*; see also *Vidyagauri v. Narandas*, *supra*.

Brahmos. are Hindus A declaration under Act III of 1872 is effective only for the purposes of that Act and does not imply renunciation of Hinduism. *In re Jananendra Nath Roy*, 49 Cal. 1069 : 26 C.W.N. 799 : 1923 Cal. 265 : 70 I.C. 463. See also *Vidyagauri v. Narandas*, *supra*.

Buddhists. This term includes the Burmese, the Tibetans in the valley of Spiti and the Lepchas of Darjeeling, but not the Kalais who are the offspring of inter-marriage between Hindus and Burmese. *Ma Yae v. Maung Chit*, 48 I.A. 553 : 42 M.L.J. 193 : A.I.R. 1922 P.C. 197 : 66 I.C. 609 ; nor the Chinese Buddhists, *Ma Thin Shein v. Ali Shein*, 8 L.B.R. 222 : 7 Bur. L.T. 246 : 24 I.C. 367,—following 2 L.B.R. 95. As to the effect of conversion of Buddhist to Christianity, read the notes at p. 10, *ante* 'The adopted girl of a Buddhist woman who subsequently became a Christian and died as a Christian intestate could not inherit her. *Makhim v. Ma Ahma*, 12 Rang. 188 = A.I.R. 1934 Rang. 72 = 149 I.C. 1148.'

Sikhs. They are also a sect of Hindus of which they are a dissenting branch, see 10 B.H.O.R. 241 (260). They are mainly governed by the Mitakshara school of Hindu law. Cf. *Kissen Chunder v. Bidan Bibee*, 2 Morl. Dig. 22. See also the notes under the heading "Hindus," *supra*.

Jainas. They are practically a sect of the Hindus, differing from the rest, in some very important tenets ; but following in other respects a similar practice and maintaining like opinion and observations", *vide Majumdar's Hindu Wills*, p. 29.

They are mostly governed by the ordinary Hindu Law of inheritance applicable to that part of the country in which the property is situate [Cf. 10 Bom. H.C.R. 240 (250) : 8 W.R. 116] ; unless there is any special custom, varying that law, *Chotey Lal v. Ohunnoo Lall*, 4 Cal. 744 ; 3 C.L.R. 465 ; *Bachebi v. Makhan Lal*, 3 All. 55 ; *Rakhab v. Chunilal*, 16 Bom. 347 ; *Ambabai v. Govind*, 23 Bom. 267 ; Jainas are the same as Saracis. *Harnabh v. Rajajee*, 27 Cal. 379.

5. [Suc. S. 5] (1) Succession to the immoveable property in

Law regulating succession to deceased person's immoveable and moveable property res. India of a person deceased shall be regulated by the law of India, wherever such person may have had his domicile at the time of his death.

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of death.

Illustrations

(i) A, having his domicile in India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable in India. The succession to the whole is regulated by the law of India.

(ii) A, an Englishman, having his domicile in France, dies in India, and leaves property, both moveable and immoveable, in India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of India.

The Law of Domicile :—The Law of domicile is a branch of "Private international Law" or more properly "conflict of Laws," see Holland Jurisprudence 10th Ed., 405. It consists of the rules adopted by the Courts of all civilized countries for determining the limit of their own jurisdiction in disputes arising abroad or in connection with foreign transactions ; and if the matter falls within their jurisdiction for determining the law, foreign or otherwise, which in the circumstances of the case it would be their duty to apply. see Halsbury's *Laws of England*, Vol. VI., 180. A deceased person may have different properties in different countries with as many different representatives as the number of the countries, and this state of things

might entail confusion and conflict in the distribution of his assets and to obviate that, the law of domicile was adopted by civilized nations, see *Enokin v. Wylie* 10 H.L.C. 15; *Domicile and allegiance* though cognate in determining the civil rights of a man, are still contradistinguished from each other. The former refers to the civil status of the man whereas the latter to his political status. A man may have his allegiance to the sovereign of one country, but succession to his property may be governed by the law of another country in which he had his domicile. Domicile is the criterion established by law for the purpose of determining the civil status of a man, *Udney v. Udney*, L.R. 1 Sc. App. 441, although it may not regulate succession to immoveable property in India, *Ritanshaw Dinsharoji v. Bamanji Dhanjibhai*, 40 Bom. L.R. 141 = A.I.R. 1938 Bom. 288 = 175 I.C. 200.

In its ordinary sense, the term "domicile" means the place where a person lives or has his home. In a legal sense, the domicile of a person is where he has his true fixed permanent home and principal establishment to which he *intends* to return. Therefore domicile connotes two things, (1) Residence, (2) Intention of making it a home. See Story's *Conflict of Laws*, Ch. III, sec. 43. Domicile does not refer to the exact locality where the person has his home, but to the entire area including that locality which is subject to a common system of law. Cf. *Re Gapdeviella*, 88 L.J. Exch. 306 (3:6); it must not be confused with nationality, *T. E. T. Shore v. H. C. Morgan*, 82 Cal. 869. Domicile may be acquired, (1) by birth called the domicile of origin in this Act, (2) by choice, or (3) by operation of law, (e.g. by marriage). The domicile acquired by birth is not voluntary being the creation of law and not of the person. It revives when the man has no other domicile, because a man cannot at any time be without a domicile, *Udney v. Udney*, L.R. 1 Sc. App. 441. *King v. Foxwell*, I.R. 3 Ch. Div. 518. Cf. *Bell v. Kennedy*, L.R. 1 Sc. App. 307. *Re patience v. Main*, 29 Ch. D. 976; *Atchison v. Dixon*, L.R. 10 Ep. 589; *Craignist v. Hewett*, (1892) 3 Ch. 180. Domicile of choice is voluntary being the creation of the person, *Winans v. Attorney-General*, (1904) A.C. 287; *Huntley v. Gaskell*, (1906) A.C. 66. Until a new domicile is taken forsaking the old, the old domicile clings to the man, (see sec. 9), *Somerville v. Somerville*, 5 Ves. 786; *Lord v. Colvin*, 4 Drew, 368. Cf. *Bruce v. Bruce*, 2 Bos. & P. 229; *Santos v. Pinto*, 41 Bom. 687 *infra*. The acquisition of a new domicile does not operate to extinguish the old domicile, but only keeps it in abeyance, and the old domicile revives when the person has no other domicile. *Udney v. Undey*, *supra*. Under sec. 13, *post*; the old domicile does not seem to revive of itself but has to be resumed. A domicile of choice may be abandoned *animo et facto* (in intention and in fact) without the acquisition of another domicile of choice. The original domicile continues unless the intention to abandon it is accompanied by actual abandonment, see *Santos v. Pinto*, 41 Bom. 687; 18 Bom. L.R. 715; 86 I.C. 297, or in other words, so long as the residence continues and there is no actual abandonment; mere change of intention is of no use, *Mofett v. Mofett* (1920) 1 Ir. R. 57, C.A. See also *Re Stern*, 28 L.J. Ex. 22. If a man alleges that one had acquired a domicile

of choice, he must prove that person had that intention. *Ibid.* Cf. *Winans v. Attorney-General*, (1904) A.C. 287; because law always makes a presumption in favour of the domicile of origin, *Attorney-General v. Rowe*, 1 H. & C. 81. Change of residence however long and continued is not sufficient evidence of intention, *Pitt v. Pitt*, L.R. 4 H.L.C. 627; 13 W.R. 1089. Domicile can always be ascertained either by means of a legal presumption or from the known facts of the case. If a person who has no fixed place of residence, expresses his intention to settle at the place of his wife's parents and stays with those parents at times that place would be his domicile of choice, *Sita Devi v. Gopal Saran*, 9 P.L.T. 897—A.I.R. 1928 Pat. 375—111 I.C. 762.

The word "domicile" in this Act and in the Divorce Act, 1869, has exactly the same meaning, *Weston v. Weston*, A.I.R. 1945 Sind 152=223 I.C. 88 (S.B.).

Domicile of Corporation :—It seems that *person* in this section is used in the restricted sense of a person *subject to death*, and not in the broad sense of the General Clauses Act, sec. 3 (39), in which it includes a company or an association, which never dies. However, foreign text writers have spoken about *domicile of corporations*, and it will be sufficient for our purpose to say that such *domicile* is determined with reference to its place of business, *Tutika Basavaraju v. Parry & Co.*, 27 Mad. 315.

Importance of the question of *domicile* on Succession :—It is now an accepted rule that the law of the country in which the deceased was domiciled *at the time of his death*, his *lex domicilis* determines the course of both testamentary and intestate succession to his property. See *Williams on Executors*, 10th Ed. Vol. I, p. 275 *et seq.*; *Jarnian on Wills*, 6th Ed., p. 4 *et seq.*; *Mahomed Koya v. Katheesa Bz.*, (1944) 2 M.L.J. 365. The expression "Law of the Country" does not necessarily mean the *lex loci* or the law applicable to its own people but means the law which that country applies to foreigners domiciled therein, *Collier v. Rivaz*, 2 Cert. 866; *Williams on Executors*, 10th Ed., p. 1257 (n). Cf. also *Goloni v. Crispin*, L.R. 1 H.L. 804. When the law of the country of *domicile* recognises full testamentary disposition, a testator has the right of disposing of his movable property whether situate in that country or outside it, although his powers of disposition over immovable property situate elsewhere would be governed by the *lex situs*. *Mahomed Koya v. Katheesa*, (1944) 2 M.L.J. 365.

N.B.—"Clauses 6 to 20 (i.e. now secs. 5 to 20) deal with *domicile* and are reproduction of the corresponding sections of the Act of 1865. They are for the most part general rules which might well be applicable to all classes but clause 5 (i.e. now sec. 4) reproducing sec. 331 of the Act of 1865 excludes their application in the case of Hindus, Mahomedans, Buddhists, Sikhs and Jainas."—Notes on Clauses to the Bill.

Question of domicile under this section.—This section draws a distinction between succession to *immoveable* property and succession to *moveable* property, and lays down that the succession to the former is governed by the law of India, irrespective of any consideration for the domicile of the owner (sub-sec. 1) [*Ratanshaw Dinshawji v. Ramnaji*, 40 Bom. L.R. 141 = A.I.R. 1938 Bom. 238 = 175 I.C. 200]; and that succession to the latter (*i.e.* moveable property) is governed by the law of the owner's domicile (sub-sec. 2). It should be noticed that in both the sub-sections "succession" is used in an unqualified way so as to mean both testamentary and intestate succession. So not only the course of devolution but all the formalities attendant upon the making of a will are within the scope of the section, *Brodie v. Barry*, 2 V. & B. 131. The place where a will as to immoveable property is made and the language in which it is written are wholly unimportant both as regards its construction or its necessary formalities; the locality of the devised property is alone considered, *Bovey v. Smith*, 1 Vern. 85; *Studd v. Cook*, L.R. 8 A.C. 577. Land in India is governed by the law of India as *lex loci*, and not by the law of the domicile of the owner, *Dhanjbhai v. Kolhabai*, 31 Bom. L.R. 1081 = A.I.R. 1929 Bom. 478 = 121 I.C. 433; *Ratanshaw Dinshawji v. Ramnaji*, 40 Bom. L.R. 141 = A.I.R. 1938 Bom. 238 = 175 I.C. 200. Therefore, under this section in case of immoveable property the *lex domicili* does not trouble us; the *lex situs* of the property is to be looked to, *Bonind v. Emile Charriol*, 32 Cal. 631. Thus, a man domiciled in England makes a will as to immoveable property in India, he will have to conform to the requirements and formalities of this country, *Barlow v. Orde*, 13 M.I.A. 277 : 5 B.L.R. 1 : 13 W.R.P.C., 41 (P.O.). Likewise, a Scotchman during his service under the East India Company acquired an Anglo-Indian domicile, and died executing a holograph will which was valid under the Scotch law, but was not in conformity with the law of this country, and therefore the Court refused probate on the ground of improper execution of the will, see *Goods of Elliott*, 4 Cal. 106, *vide also* the other cases—*Arnold v. Arnold*, 2 M. & Cr. 266; *Mc. Donald v. Mc. Donald*, L.R. 14 Eq. 60; *Skinner v. Skinner*, 31 All. 239; *Bhanrao v. Lakshmisabas*, 20 Bom. 607. A testator acquiring a domicile in Ceylon, gets under Ceylon Ordinance No. XXI of 1844, complete power of disposition over all his properties, movable and immovable, within the island of Ceylon and also over immovable property in India and where that Ordinance has left any personal law untouched, that personal law as *lex situs* will apply in relation to his immovable property abroad, including India, *Mahomed Koya v. Kathesa*, (1944) 2 M.L.J. 365. Under sub-sec. (2) in case of moveables *lex domicili* has real importance. If the testator of such property has an ascertained domicile, the construction of his will must be dependent on the law of that domicile, but if the domicile is unascertainable, the Court is to follow the principles of natural justice, *Barlow v. Orde*, *supra*.

Application of the Section:—It applies to both immoveables and moveables and to both testamentary and intestate succession. *Vide supra* at p. 23. The law

that succession to immoveable property is governed by *lex situs* is limited to property of private individuals and does not apply to property held by a foreign or feudatory State, see *Hajan Manick v. Beer Singh*, 11 Cal 17 Cf. *Emperor of Austria v. Dug*, 80 L.J. Ch. 690; *United States of America v. Wagner*, L.R. 2 Ch. App. 682; *Nil Kisto v. Beer Chand*, 12 M.I.A. 528; *Beer Chunder, v. Raj Comar*, 9 Cal. 595; *Beer Chunder v. Ishan Chunder*, 10 Cal. 186; *Samarendra v. Birendra Kis-hars*, 35 Cal. 777.

Domicile at the time of Death:—This section accepts the general rule that the domicile which determines the law of succession is the domicile at the time of the death of the owner. Cf *Enochin v. Wylie*, 10 H.L.C. 1; *Re Trifort*, 36 C.D. 600. The English law is practically to the same effect, (with a slight modification for which see *Re Johnson v. Attorney-General*, 1909, 1 Ch. 821.)

6. [Suc. S. 6] A person can have only one domicile for One domicile only affects the purpose of the succession to his moveable succession to Moveables. property.

This section accords recognition to the general rule that "no person can at the same time have more than one domicile," see *Somerville v. Somerville*, 5 Ves. 750. The English Domicile Act, 1861, 24 and 25 Vic. C. 121 however recognises duality of domicile. When a person has several residences his domicile will be determined with reference to the place where his wife and children live and their permanent place of residence and where his establishment is kept up, *Platt v. Attorney-General*, L.R. 3 App. Case 243; *Forbes v. Forbes*, (1854) Kay, 341, 352. *Attchison v. Dixor*, 10 Eq. 589. The effect of this doctrine of *single* domicile is that when a person changes his domicile, his domicile of origin does not continue but is kept in abeyance (vide notes at p. 21, ante; also *Re Raffinell*, 3 S.W. and Tr. 49; *Mc Mullen v. Wadsworth*, 14 App. Case at p. 686. In order to change his domicile of origin, a man must voluntarily fix his principal residence in the new country with the intention of residing there for a period not limited as to time, *King v. Foxwell*, L.R. 3 Ch. Div. 518

N.B.:—The words "for the purpose of succession to his moveable property" is merely a repetition of what has been said in sub-sec. (2) sec. 5, as it is only with respect to this species of property that domicil has got anything to do.

7. [Suc. S. 7] The domicile of origin of every person of legitimate birth is in the country in which at the Domicile of origin of person of legitimate birth. time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Illustration

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.

The domicile of origin of a person of legitimate birth is determined by the domicile of the father on the date of his birth. This is also the law in England. Cf. *Udney v. Udney*, 1869 L.R. 1 Sc. App. 441; also *Santos v. Pinto*, 41 Bom. 687. If the child be born after the father's death then by the domicile the father had at the time of his death, *Dalhousie v. Macdonall*, 7 Cland. F. 817; *Sharp v. Waspin*, 1 P. and D. 611. This section applies only to a person of *legitimate* birth.

If a child is born during a journey, that does not affect the question of domicile because the parent's domicile and not the accidental place of birth will determine the child's domicile, *Firebrace v. Firebrace*, 4 P.D. 63 (66).

8. [Sect. S. 8] The domicile of origin of an illegitimate child Domicile of origin of is in the country in which, at the time of his birth, illegitimate child. his mother was domiciled.

This section provides for the domicile of an illegitimate child, which is that of its mother, Cf. *Urquhart v. Butterfield*, 37 Ch. D. 357 and the cases under the previous section.

A foundling's domicile is the country in which he is born or found.

As to the domicile of a minor, see sect. 14 *infra*.

9. [Sect. S. 9] The domicile of origin prevails until a new Continuance of domicile of origin has been acquired.

Continuance of Domicile of Origin:—Until a man forsakes his domicile of origin by taking up a new one, his old domicile clings to him, see *Santos v. Pinto*, 41 Bom. 687 : 18 Bom. L.R. 715 : 36 I.C. 227; *Somerville v. Somerville*, 5 Ves. 786 and the other cases cited at p. 21, *ante*. Every man's domicile of origin must be presumed to continue until he has acquired another domicile by actual residence with the intention of abandoning his domicile of origin, *Aikman v. Aikman*, 3 Macq. 877. We have seen that when a new domicile is acquired, the domicile of origin is not extinguished but is kept in abeyance, and it revives the moment the new domicile is lost and for this purpose no particular act is necessary, *Re Raffinell*, 3 Sw. and Tr. 49 and the cases at pp. 21 and 24. Long residence in another country does not interfere with the continuance of domicile of origin, if there is persistent desire to return to his country, *Winans v. Attorney-General*, 1904, A.C. 287.

Effect of discontinuance of British India :—By reason of the Independence Act, a person who had originally the domicile of British India would automatically become a domicile of Pakistan or India, unless the old domicile has been voluntarily abandoned for a new domicile: See *Rosetta v. Justin*, A.I.R. 1958 Cal. 530.

10. [Suc. S. 10] A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.—A man is not to be deemed to have taken up his fixed habitation in India merely by reason of his residing there in the civil, military naval or air-force service,⁽¹⁾ of Government or in the exercise of any profession or calling.

Illustrations.

(i) A, whose domicile of origin is in England, proceeds to India, where he settles as a barrister or a merchant intending to reside there during the remainder of his life. His domicile is now in India.

(ii) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(iii) A, whose domicile of origin is in France, comes to reside in India under an engagement, with the Central Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in India.

(iv) A, whose domicile is in England, goes to reside in India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in India, however long the residence may last.

(v) A, having gone to reside in India in the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in India. A has acquired a domicile in India.

(vi) A, whose domicile is in the French Settlement of Chandernagore is compelled by political events to take refuge in Calcutta, and resides in Calcutta for

1. The words "naval" or "air-force" were inserted by Act xxxv of 1934 and Act x of 1927, and A.O. 1950.

many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in India.

(vii) A, having come to Calcutta in the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in India.

N.B.:—Chandernagore is no longer French Settlement, but now is within India, *vide* A.I.R. 1954 Cal. 615.

What constitutes change of Domicile:—A person is said to have changed his domicile when he fixes his sole and principal habitation in a country which is not his domicile of origin, with the intention of residing there for a period not limited as to time, *King v. Foxwell*, 3 Ch. D. 518; *Roberts v. Attorney-General*, 1903, 1 Ch. 821; *D'evon v. D'revon*, 12 W.R. 946; a residence abroad with the view to making a fortune operates as a change of domicile, *Allordice v. Onslow*, 33 L.J. Ch. 434; *Lyall v. Panton*, 25 L.J. Ch. 746. An Englishman coming here and residing in this country for the greater part of his life intending to devote it to missionary service may be taken as having adopted an Indian domicile with the effect that he will be governed by the provisions of this Act. *T.E.T. Shore v. H.O. Morgan*, 62 Cal. 869. But simple residence abroad on public duty constitutes no change of domicile, *Sharpe v. Crispin*, 1 P. and D. 611; *Attorney-General v. Napier*, 6 Ex. 217. To constitute change of domicile, it must be *animus et factio*. *Douglas v. Douglas*, L.R. 12 Eq. 617; *Re De Almeda*, (1902) W.N. 55 and the cases in the next paragraph on Intention. Compulsory residence effects no change of domicile, see notes at p. 28. In order to constitute change of domicile there must be a fixed determination in a person to strip himself of his nationality. Thus, an American lived for 27 years in England and expressed desire to return to his country but complained that his health did not permit it, held, he had not abandoned his domicile of origin, *Winans v. Attorney-General*, 1904 A.C. 287. But as seen above, the position of English missionary coming to this country to devote his life to missionary work is different, 62 Cal. 869.

Proof of change of Domicile:—The question of domicile is a mixed question of law and fact, rather more of fact than of law, *Voucher v. Solicitor*, 40 Ch. D. 216; *Bempde v. Johnstone* 3 Ves. Jun., 198 (201); The question whether a person abandons his domicile of origin and acquires a new domicile largely depends on residence coupled with an intention on his part to choose the new country where he resides as his permanent home in preference to the country of his birth, *T.E.T. Shore v. H.O. Morgan*, 62 Cal. 869. Change of domicile is a serious matter and

must be proved by satisfactory evidence, *Hunty v. Gaskell*, (1906) A.C. 56. The proof of intention is the most important factor and length of residence may be proof of intention, *Cookerell v. Cockerell*, 25 J. Ch. 782. Cf. *Waddington v. Waddington*, 36 T.L.R. 359; *Anderson v. Lanenville*, 9 Moo. P.C. 325; *Doucet v. Geoghegan*, 9 Ch. D. 441; *R. Craigie*, (1892) 3 Ch. 180. The onus of proof of the change of domicile is on the person who sets it up, *T.E.T. Share v. H.C. Morgan, supra*; that is, the party alleging the change of domicile must prove it, *Sontos v. Pinto*, 41 Bom. 687=18 Bom. L.R. 715=36 I.C. 227; *Winans v. Attorney-General*, (1904) A.C. 287. If a person has taken up a permanent residence in another country, that will raise a presumption of change of domicile and such presumption will not be rebutted by a mere declaration of intention to return, *Attorney-General v. Kent*, 1 H. and C. 12; *Stevenson v. Mission*, L.R. 17 Eq. 78. Cf. *Cardagle v. Cardagle*, (1919) A.C. 145. For intention as an important factor, see also *Patience v. Martin*, 29 Ch. D. 976; *Rosetta v. Justin*, A.I.R. 1953 Cal. 580 and for surrounding circumstances as evidence of intention, see 9 Ch. D. 441; 1 Milw. 187; 12 Moo. P.C. 285; and the other cases cited at p. 23 of Henderson's Succession Act, 4th Ed. For the effect of length of time as an important ingredient in the evidence of intention, see *Mufett v. Mufett*, (1920) 1 Ir. R. 57, O.A.

Fixed Habitation :—Taking up a *fixed habitation* in the country is the chief essential of a change of domicile as it implies complete abandonment of the domicile of origin. To acquire a new domicile there must be a complete transit to and an *actual residence* in the new home. When once the transit is complete, length of time is of no consequence, see under the headings "What constitutes change of domicile" and "Proof of change of Domicile" at pp. 27-28; also *Muhomed Haji v. Khatubai*, 49 Bom. 647. The word "fixed" implies a determination of the person to strip himself of his nationality, but does not mean that the new domicile is to be his last. On this subject see *Waddington v. Waddington*, 36 T.L.R. 359; *Forles v. Forbes*, Kay, 352; *De Bonneveal v. De Bonneveal* 1 Curt. 856 and the cases cited at pp. 27-28.

Compulsory residence—effect of—on domicile :—A domicile of choice can be acquired only by *choice* and not by *compulsion*, *Pitt v. Pitt*, 12 W.R. 1089; *Lanstalan Lanstalan*, 48 W.R. 509. Compulsory residence abroad (for health or as a refugee or on service, etc.) does not effect a change of domicile, *De Bonneveal v. De Bonneveal*, 1 Curt 856; *Re Dulep Singh*, 7 Mcrell, 228; *Winans v. Attorney-General*, (1902) A.C. 287; *Re James*, 98 L.T. 438. But resorting to a place for benefit of health almost bordering on voluntary adoption of a domicile and not under compulsion may produce a different effect. Cf. *Hoskins v. Mathew*, 3 De G. M. & G. 13 (28). As to whether residence abroad for trading or commercial purposes is *compulsory* or *voluntary*, see *Doucet v. Geoghegan*, 9 Ch. D. 441 and the other cases at p. 27. If there is a persistent desire to return to the native country, and the detention in the foreign country is due to unavoidable circumstances, such residence abroad is

compulsory, *Wishans v. Attorney-General*, (1904) A.C. 287. So a prisoner preserves his domicile, *Burton v. Fisher*, 1 Mil. 183.

Explanation :— The explanation purports to reiterate the settled law that a person residing in India in Her Majesty's Military or Civil Service or in the exercise of any profession or calling does not lose his domicile of origin and acquire an Anglo-Indian domicile, see *Bruce v. Bruce*, 2 B and P 229 (n); 6 Bro. P.C. 566. *Forbes v. Forbes*, 1 Kay 341; *Wanchaps v. Wanchaps*, 2 C.L.R. 497 (n). Cf. *Murphy v. Murphy*, 10 Lah. 607—A.I.R. 1929 Lah. 419 (F.B.). Insertion of this explanation was deemed necessary in view of the fact that the officers of the East India Company, not being officers of the Crown, lost their domicile of origin acquiring here an Anglo-Indian domicile, during their stay in this country. See *Goods of Elliott*, 4 Cal. 106. To avoid a similar fate for the officers in her Majesty's service the Law Commissioners wanted to make the law explicit.

Articles 6 and 7 of the Constitution of India dealing with the question of citizenship of persons migrating between India and Pakistan may produce a certain amount of orientation on the question of old domicile of people of British India since geographically disappearing and may deserve some discussion on that account. The recent cases of A.I.R. 1953 All. 178; I.L.R. (1954) Mys. 125—A.I.R. 1954 Mys. 152.; A.I.R. 1954 Bhopal. 9 will be found useful for that purpose.

II. [Suc. S. 11] Any person may acquire a domicile in India by making and depositing in some office in India, ^{Special mode of acquiring domicile in} appointed in this behalf by the State Government, a declaration in writing under his hand of his desire to acquire such domicile; provided that he has been resident in India for one year immediately preceding the time of his making such declaration.

This section makes provision for evincing a clear intention of changing the domicile. The declaration to be made under the section will clearly show *animus* or intention to abandon the old domicile. The Declaration has to be lodged in some Government office. In Oudh, such declaration is to be deposited in the office of the Judicial Commissioner at Lucknow (*vide* notification at p. 803 of the Gazette of India, July 15th, 1865); in Burma in the office of the Chief Commissioner of Br. Burma (*vide* Gazette of India, 29th July, 1865, p. 845). A declaration hereunder confers an Indian domicile only for the purpose of succession under this Act; it does not affect the declarant's domicile for the purposes of divorce, *Charles Reginald v. Elizabeth Finch*, I.L.R. (1943) Lah. 765—45 P.L.R. 318—A.I.R. 1943 Lah. 260—209 I.C. 523 (S.B.). See also *Allen v. Allen*, A.I.B. 1945 Sind. 171 (S.B.); *Weston v. Weston*, A.I.R. 1945 Sind. 152 (S.B.)—222 I.C. 68.

Special mode of acquisition of Domicile by Declaration :—The following are the essential requisites for this purpose: (1) The person intending to acquire domicile must make a declaration; (2) It is to be in writing; (3) to be signed by the person; (4) it is to be deposited in some office of India appointed by State Government; (5) The declaration should contain an expression of desire to acquire domicile; (6) the person must reside in India for one year before making such declaration. The provisions of this section substantially accord with the principles upon which English decisions regarding a change of domicile have been based, *Weston v. Weston*, A.I.R. 1945 Sind, 152 (S.B.), *supra*.

12. [Sue. S. 12] A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first-mentioned person as part of his family, or as a servant.

Ambassadors and Consuls :—They retain their domicile of origin notwithstanding their stay in a foreign country, and this privilege is extended to their family members and servants. If however, a person is already domiciled in a foreign country and is then appointed an ambassador or consul in that country, his original domicile is not thereby revived, *Heath v. Samson*, 14 Beav. 441; *Sharpe v. Crispin*, L.R. 1 P and D. 611. There is nothing to prevent an ambassador from abandoning his own domicile and adopting that of the foreign country, *Hamilton v. Dallas*, 1 Ch. D. 257; *Attorney-General v. Kent*, 31 L.J. Ex. 391. We have already seen that residence abroad on public duty does not entail change of domicile, *Sharpe v. Crispin*, *supra*, and the cases at pp. 28-29.

13. [Sue. S. 13] A new domicile continues until the former domicile has been resumed or another has been acquired.

Continuance of new domicile.

See the cases under the foregoing sections. The present section follows from the maxims "A man cannot be without a domicile" and "he cannot have two domiciles at a time." Under sec. 9, the domicile of origin prevails until a new domicile is acquired. Now, according to the rule in *Udney's case* (at p. 21), on the acquisition of a new domicile, the old domicile remains in abeyance and automatically revives with the renunciation of the new domicile. But the word "resumed" (which implies an *animus*) in the section seems to negative such automatic revival and suggests that a new domicile cannot be lost by mere abandonment and that it continues until the intention of reverting to old domicile is put to execution. In

this way the rule of *Udney's* case seems to have been modified by this section. Cf. *King v. Fow woll*, 3 Ch. D. 518; and *Cockerell's Waddington's* and *Douglas's* cases at p. 28, and *Udney's* case at p. 21. See also *Winans v. Attorney-General*, (1904) A.C. 287; *Re Morrell*, 36 C.D. 400; *Munroe v. Douglas*, 5 Mad. 379.

14. [Soc. S. 14] The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.
Minor's domicile.

Exception—The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of Government or has set up, with the consent of the parent, in any distinct business.

Domicile of a Minor:—The domicile of a legitimate child is that of its father (sec. 7, *supra*) and of an illegitimate child, that of its mother (sec. 8). This section lays down that the domicile of a minor follows the domicile of his father or mother (as the case may be) from whom he derived his domicile of origin. Note that the section uses the general term *parent* obviously to include the cases of both legitimacy and illegitimacy. *A minor is incapable of changing his own domicile of his own accord during his minority.* *Somerville v. Somerville*, 5 Ves. 787. *Urquhart v. Butterfield*, 1887, 37 Ch. D., C.A. 357. See also sec. 17, *post*. If the disability of non-age is followed by that of insanity, lasting for life, parental domicile will ever determine the domicile of such disable person. Cf. *Sharpe v. Crispin*, L.R. 1 P. & D. 611. It is taken as settled law that on the death of the father, the domicile of the minor (if living with the mother and he unmarried) changes with that of the mother (subject to certain limitations, as in the case of (fraud) *Potenger v. Wighman*, 3 Mer. 67; *Re Beaumont*, 1893, 3 Ch. 490; see *Henderson's Succession Act*, 4th Ed., p. 27. So if the mother's domicile be changed by a second marriage (sec. 15), there will be a necessary change in the domicile of the minor if living with the mother, *Ibid.* This view is however open to criticism as this section (sec. 14) does not authorise the minor to follow the domicile of a parent from whom he had not derived his domicile of origin. On the other hand under sec. 9, the domicile of his origin will naturally continue. Even the mother's power to change the minor's domicile on the death of his father be conceded, still if the mother acts with a fraudulent motive, the infant's domicile remains intact. Cf. *Douglas v. Douglas*, L.R. 12 Eq. 617.

Guardian's power to change minor's domicile:—Doubts have been expressed as to the guardian's power in this direction, *Douglas v. Douglas*, L.R. 12 Eq. 617. But this section read with sec. 9 seems to negative such power; read the criticism in the previous paragraph. Besides, it is worthy of note that under sec. 26 of the *Guardian and Wards Act*, a certificated guardian (not being the Collector or a

testamentary guardian) cannot remove the minor from the jurisdiction of the Court that appointed him. It is said that where the wife acts as the guardian of her lunatic husband, she can alter the husband's domicile according to her own choice, see Ha. & Jarm (12th Ed.), p. 519. See also Dicey, p. 128.

Exception : Emancipation of Minor :—Here is an *exception* to the general rule that a minor follows the domicile of his parent. The exception contemplates three contingencies and on the happening of any one or more of them the minor is taken as emancipated from parental control and capable of choosing his domicile for himself, Cf. *Rex v. Wilmemgton*, 5 B. & Al. 525,—(1) Marriage, (2) entry into His Majesty's service, (3) setting up an independent business *with the parent's consent*. The theory underlying the first contingency is that upon marriage the minor gets a separate establishment of his own and becomes a *sui juris* in respect of his domicile. Besides in the cases of a female, marriage itself entails a change of domicile (see sec. 15). It should be remembered always that if the domicile is not *actually* changed on marriage, the old domicile continues under sec. 9. Service under the Government produces a similar result, only with this difference, that if the service ceases, the parental control revives. (*Rex v. Rotherfield*, 1 B.C. 346). The third contingency is the starting of an independent business *with the parent's consent*. Emancipation follows this contingency as his business relations demand it. Note that the first two contingencies are not subject to parental consent whereas the third can take place only *with such consent*.

15. [Suc. S. 15] By marriage a woman acquires the
Domicile acquired by
woman on marriage. domicile of her husband, if she had not the same
domicile before.

Domicile of Woman on Marriage :—This section follows the principle of natural justice. The wife, having to live with the husband, follows his domicile, *Warrender v. Warrender*, 2 Cl. & Fin. 488; *Whitcomb v. Whitcomb*, 2 Curt. 35; *Lord Advocate v. Jaffrey*, 89 L.J.P.O. 209; *Dalhousie v. McDonall*, 7 Cl. & Fin. 817. She retains her husband's domicile during her marital life, (see sec. 16 *infra*). The fact that she has successfully resisted the husband's suit for restitution of conjugal rights does not make any difference, *Yelverton v. Yelverton*, 1 Sw. and Tr., 574; *Dolphin v. Robins*, 7 H.L.C. 390. The word "marriage" in the section means only *actual and lawful* marriage and does not include betrothal or unlawful marriage. The mere fact that the marriage is *voidable* will make no difference, so long as it is not avoided, *Turner v. Thompson*, 13 P.D. 37. After a decree for divorce (divorce *a vinculo*) but not before (see *Re Mackenzie v. Edward Moss*, 1911, 1 Ch 578), the wife is at liberty to select her own domicile, *Williams v. Darmer*, 2 Rob. 505, but until she exercises her option the

marital domicile continues under sec. 18. Cf. *Warrender's case, supra*. The same effect of judicial rule applies also to a divorce *mensa et thoro*, or judicial separation. *Dolphin v. Robins* 7 H.L.C. 890 : (Cf. Divorce Act, IV of 1869, S. 22) 7 H.L.Ca., p. 416; *Le Seur v. Le Seur*, 1 P.D. 189; 2 P.D. 79; Effect of separation but not to a woman living apart from her husband by by deed of agreement. agreement, so that in her case, the matrimonial domicile continues, see *Warrender's case, supra*; *Re Daly's Settlement*, 25 Beav. 456. As to the domicile of a deserted wife, see the cases cited above; *Stathatos v. Stathatos*, 107 L.T. 592. The widow retains her marital domicile until she actually changes it. *animo et factio*, see sec. 18 and *Kashibo v. Shripat Nurshie*, 19 Bom. 697; also 1 Cal. 412. By remarriage she will acquire the domicile of her new husband, sec. 15 and *Dalhousie v. McDonald*, *Supra*. Cf. *Salveson v. Administrator*, (1927) A.C. 641.

Migration by the widow and her change of domicile from French to British India does not change the character of the estate held by her, and if she does not adopt the Hindu law which was in force in British India, the property inherited by her from her husband would be held by her according to the customary law of French India, *Mailathi Anni v. Subbaraya*, 24 Mad. 650.

N. B.—When the marrying parties are of the same domicile, no question of change of domicile arises under this section. When both the marrying parties have an English domicile, then succession as between them with respect to their moveable property in India will be governed by the English law. Thus, in *Miller v. Administrator-General*, 1 Cal. 412, both the spouses being of English domicile, the wife's moveables in India were held to pass to the husband by succession to the exclusion of the next of kin. As to how the change of domicile consequent upon the woman's marriage affects the question of distribution of property, see *Allumuddy v. Braham*, 4 Cal. 140; *Hill v. Administrator-General*, 29 Cal. 506.

16. [Suc. S. 16] A wife's domicile during her marriage wife's domicile during follows the domicile of her husband. marriage.

Exception.—The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

This section says that the marital domicile continues so long as the marriage lasts. For cases on this subject see notes under sec. 16 where they have been dealt with in details. This section does not contemplate the cases where the marriage is terminated by death or divorce *a vinculo*. A married woman migrating to Pakistan with her parents does not acquire a new domicile different from that of her Indian husband, *Allah v. Union of India*, A.I.R. 1954 All. 456. Cf. A.I.R. 1951 All. 16; A.I.R. 1953 All. 267.

Exception—Emancipation of wife:—The wife's liability to follow her husband's domicile determines—(1) if they are separated by the sentence of a competent Court, or (2) if the husband is undergoing a sentence of transportation. "Separation" should be under the Court's order. It is not necessary that the separation should be by actual divorce *a vinculo*. As a matter of fact this section does not contemplate an ended or terminated marriage. A divorce *mensa et thoro* or a judicial separation (see Indian Divorce Act, IV of 1869, S. 22), is sufficient, *Williams v. Darmer*, 2 Robb. 505; *Dolphin v. Robins*, 7 H.L.C. 890, 416. The Indian law does not recognise any other ground of emancipation for the wife (as distinguished from the widow) except those mentioned here. But under the English law desertion by the husband also emancipates the wife, and she then regains her former domicile, see *Stathatos v. Stathatos*, 107 L.T. 592; also *Ogden v. Ogden*, (1908) P. 46; *De Montaign v. De Montaign*, (1913) P. 154.

Competent Court:—Unless the separation is decreed by a Competent Court, this section has no application. Cf. *Tollemache v. Tollemache*, 1 Sw. & Tr. 557; thus, the English Matrimonial Court refused to recognise a sentence of divorce made by a foreign Court, in *Dolphin v. Robins*, 7 H.L.C. 890. Cf. *Argent v. Argent*, 84 L.J. P. & D. 183.

17. [Sect. S. 17] *Save as hereinbefore otherwise provided in Minor's acquisition of this Part,* a person cannot, during minority, acquire a new domicile.

There is a verbal change in the section which has been noticed in *italics*. We have already dealt with the minor's inability to acquire a new domicile in the notes under sect. 14, which please see at p. 31, *ante*, and the cases cited there. A minor female acquires the husband's domicile on her marriage, see notes at p. 32, *ante*.

18. [Sect. S. 18] An insane person cannot acquire a new domicile in any other way than by his following the domicile of another person.

The disability of an insane person is very much like that of a minor, only with this difference that whereas the minor is under parental control, no definite person has been mentioned in this section as the controller of the insane's destiny in the matter of domicile. The section speaks of only *another* person which is very vague. The expression "another person" will include the curator or the committee of the lunatic and in the case of a person who is of unsound mind from his minority, it will include his father, see *Sharpe v. Crispin*, L.R. 1 P. & D. 611.

19. [Suc. S.19] If a person dies leaving moveable property Succession to moveable in India, in the absence of proof of any domicile property in India elsewhere, succession to the property is regulated in absence of proof of domicile elsewhere by the law of India.

Presumption of Indian Domicile:—Under sec. 5 (2), succession to moveable property in this country is governed by the *lex domicili* or the law of the country in which the deceased person was domiciled. This section provides a rule of presumption in favour of such person's Indian domicile in the absence of proof of any foreign domicile, see *Bonnaud v. Emsle Charriol*, 32 Cal., 681. But Cf. *De Nicols v. Ourlier*, (1900) 2 Ch. 410. As in sec. 5, so in this section, succession is mentioned in an unqualified way so as to include both testamentary and intestate succession. In order to attract the operation of this section the moveable property in question must be in India, and the domicile of the deceased person must be unknown, that is, there is no evidence of the person's domicile being elsewhere. The presumption of this section is general and arises against *change of domicile* as well. Cf. *Hudson v. De Beauchesne*, 12 Moo P C 285. If the domicile be known, but if the law of the country of domicile be unknown, consequence is the same. Or in other words, ignorance of the *lex domicili* and that of the domicile itself operate alike, and being in such ignorance the Court will apply the law of its own forum, see *Davison v. Gibson*, 66 Fed. 443. Proof of the law of foreign domicile may be obtained from the ambassador of that foreign country. Cf. *Re Dormoy*, 3 Hagg. 767. The presumption raised by this section is always rebuttable and may be excluded by positive proof of the foreign domicile of the deceased person.

Burden of Proof:—The burden of proving a domicile elsewhere than in India is on the person setting up such a domicile, see *Bonnaud v. Carriol*, 32 Cal. 681; *Bell v. Kennedy*, L.R. 1 Sc. App. 807; *Bruce, v. Bruce*, 1790 6 Bro. P.C. 566; *James v. James*, 98 L.T. 498. If a person alleges that a man had acquired a domicile of choice he must prove that that man had that intention, *Santos v. Pinto*, 41 Bom. 687: 18. L.R. 715: 36 I.C. 227.

PART III

MARRIAGE

20. [Suc. S. 4] (1) No person shall, by marriage, acquire Interests and powers any interest in the property of the person whom he not acquired nor lost by or she marries or become incapable of doing any marriage. act in respect of his or her own property which he or she could have done if unmarried.

(2) *This section—*

(a) [Suc. S. 331] shall not apply to any marriage contracted before the first day of January, 1866;

(b) [Marr. Women's Pro. A., S. 2] shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion.

"Original Clauses 54 and 55 (that is, secs. 44-45 of the Ind. Suc. Act, 1865) have been taken out of Original Part IV and with original clause 4 (sec. 4) formed into a new Part (now Part III) dealing with the effect of marriage on rights of Succession."—Notes on Clauses.

Scope of the Section:—This section does away with the common juristic theory that the husband and the wife are *one person in law*. Cf. *Proby v. Proby*, 5 Cal. 357, and declares that marriage by itself will not confer any right either on the husband or the wife with respect to each other's property; nor will it affect any of their powers of absolute control over their respective separate properties. So, it simply (as does sec. 44, *post*) relates to the immediate effect of marriage and does not affect the law of succession, questions about which properly arise not upon marriage, but upon dissolution of marriage by death. See *Hill v. Administrator-General*, 23 Cal. 506. This section contemplates only the (negative) effect of marriage and nothing else. So it has been held that the section has not the effect of preventing the operation of a marriage-settlement restraining the wife from anticipating or alienating property settled to her separate use, as such restraint was created by settlement and not the marriage. *Peters v. Manuk*, 22 W.R. 176 : 18 B.L.R. 383. The section is not limited to any particular kind of property; so, both moveable and immoveable properties fall within its scope. The provisions of this section are prospective and leave unaffected the rights which had already accrued before the Act, *Sarkies v. Pravancmoyer*, 6 Cal. 794. They declare the *lex loci* of the country as to how far marriage can possibly affect the respective rights of the marrying parties as regards their mutual properties, Cf. *Miller v. Administrator-General*, 1 Cal. 412. Vide also the notes under the next section under the heading, "Scope of the Section."

Where, under a will, a certain share of the testator's estate was settled upon his daughter (then unmarried) during "her life or for her separate use without power of anticipation" the Court held that the restraint clause must be read as intended to operate upon the marriage of the beneficiary, to which extent the restraint was valid in law. *In re George Bridge*, I.L.R. (1938) 2 Cal. 233 = 42 C.W.N. 577 = A.I.R. 1938 Cal. 486 = 182 I.C. 104.

Provisions to the Section:—There are two provisos: (1) The section will not apply to marriages contracted before the 1st January, 1866; (2) nor does it apply, nor shall it be deemed to have ever applied to marriages, one or both of the

parties whereunto is or are (on the date of marriage) a Hindu, Mahomedan, Buddhist, Sikh or Jain..

Under the *first* proviso marriages contracted before the 1st January, 1868, are exempted from the operation of this section. Therefore, such marriages (their instances now must be rare) were governed by the Laws of England then prevailing, under which parties enjoyed certain rights and laboured under certain disabilities in respect of their property, which we shall deal with later on. "The *second* proviso is taken from the last paragraph of sec 2 of the Married Women's Property Act, (III of 1874). This provision comes in appropriately here and it is proposed to repeal the corresponding provision in the Act in question (Act III of 1873)." — Notes on Clauses to the Bill.

Rights and Liabilities of Husband and Wife at Common Law :—(1) *Husband* : Prior to the English Married Women's Property Act, 1870 (33 & 34 Vic. C. 93), marriage vested the personal chattels of the wife (on the date of marriage) in the husband and gave him the right to reduce into possession the wife's outstanding personal chattels in action. (See *Wilkinson v. Charlesworth*, 10 Beav. 324, or the money in the hands of third persons appropriated to the use of the wife, *Fleet v. Perrins*, L.R. 4 Q.B. 500 ; or the bills and promissory notes, *Hurt v. Stephens*, 6 Q.B. 937. As to wife's real estate, the husband acquired, during the marriage, a freehold interest for the joint lives of both, with the right of alienation at pleasure and without his wife's co-operation ; thus marriage operated as a gift of the wife's property to the husband and was thus a mode of acquisition of property. Subsequently, the Married Women's Property Act, 1870, introduced certain changes, (details whereof cannot possibly be given here), enlarging the powers and the rights of the wife and relieving the husband of his liabilities in respect of his wife's debts. The Indian Married Women's Property Act, (III of 1874) has made provisions which are very much like to the English Act, and it will repay one's trouble to peruse them. This Act applies to persons having an English or Indian domicile, *Allumuddy v. Braham*, 4 Cal. 140, but not to Hindus, see sec. 2 of the Act, and *Oriental G.L. Assurance v. Amiraju*, 85 Mad. 162 ; *Shaukns v. Umabai*, 87 Bom. 471. (2) *Wife* : She was never interested in the husband's property, except that she was entitled to some dower in the event of her surviving her husband, which prior to the Dower Act, 1833, (3 and 4 Will. IV, C. 105), was an indefeasible charge on his estate. She could not acquire any legal right to personal property during her coverture, Marriage extinguished all contracts between husband and wife. She could not sue the husband for her goods ; nor could she sue any body in her own name.* Contracts of married women were void against them. She could make no valid will, though she could dispose of some of her personal properties with the husband's consent. These were "chattels in action not reduced into possession." The wife had a very important

*These disabilities were subsequently removed by the Married Women's Property Act, 1870.

power which was the brightest redeeming feature of her position ; she could by way of settlement vest her properties in trustees for her benefit, and thereby defeat the husband's rights.

N. B.:—As to the rights of succession and administration as between them, see the following sections, 85, 286, 219 (a) and (e), *infra*.

Effect of this Section :—It gives the right of ownership to a married woman which she did not possess under the English Common Law that applied in this country before the passing of the Ind. Succession Act. Or, in other words, it has kept in tact the right of a *femina sole*, (an unmarried woman). The absolute right of such *femina sole* to acquire, hold and dispose of property was conceded even by the laws of England.

This section kept the rights of the wife in tact but does not say anything about her husband's liabilities for her debts. So the result was that whereas the wife enjoyed the benefit of it, she suffered no disadvantage and this position led to the passing of the Married Women's Property Act, 1874, relieving the husband of his liabilities for the wife's debts. But between the date of this Act and 1874 the anomalous position continued ; for instance, see the case of *Peters v. Manuk*, 22 W.R. 175 : 13 B.L.R. 383. At this distant date this anomaly has no practical importance and therefore no attraction for us.

One effect of the section is the modification it introduces in the rule of the Wife's cost in Divorce English law, often applied in this country ; in a divorce proceeding the husband is liable to deposit in Court the estimated costs of the wife in it. This rule was based upon the theory that upon marriage the wife became destitute of her properties (which vested in the husband) and that no right thinking Englishman could bear the idea that his wife should be deprived of the means of defending herself. But under this section marriage involving no loss of proprietary rights, that rule of English law now ought to be sparingly used. So it has been held that in a suit for judicial separation between persons subject to this Act, the Court will not, *except under special circumstances*, order the husband to give security for his wife's cost ; *Proby v. Proby*, 5 Cal. 367. See also *Ellen v. William*, 7 C.W.N. 565. Cf. also *Mil'e v. Milne*, 40 L.J.P. and M. 18 ; *Wells v. Wells & Cotton*, 39 L.J.P. and M. 72. Subject to this above modification, the old English rule about the husband's liability to pay the wife's costs still holds good, *Beatrice Alice v. Philip*, 24 C.L.J. 226 (233-34) and the cases cited therein at p. 234. A wife without property is entitled to such costs even when she herself seeks divorce, *Natch v. Natch*, 9 Mad. 12. Other considerations also have at times induced the Court to uphold the justice of the rule that obliges the husband to pay the wife's cost, see *Young v. Young* 28 Cal. 916 ; *Jones v. Jones*, (1892), L.R. 2 P. and D. 381 ; *Brown v. Ackroyd*, (1856) 5 R. and B. 819. In *Natal v. Natal*, 9 Mad. 12, Handley J. thus observes "she is not certainly, unless she

has property, is in a position to meet her husband on equal terms and is therefore likely to be at a disadvantage and this inequality between the contending parties is the reason for the practice in question."

Disability of a Married Woman under this Act — Notwithstanding the enlargement of her rights hereby, there are still certain disabilities attaching to her. Even if she be appointed an executrix in some will she cannot obtain grant of Probate (or of Letters of Administration) without the previous consent of her husband. See secs. 228 and 286 *infra*. Such disability does not attach to Hindu, Moslem, Buddhist, Sikh or Jaina married woman or to an "exempted person," under s. 8 : *Ibid.*

21. [Suc. S. 44] If a person whose domicile is not in India marries in India a person whose domicile is in India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in India at the time of the marriage.

Scope of the Section :— Whereas sec. 20 lays down a general rule as to the effect of marriage in respect of moveable property where *both* the married persons have an Indian domicile, this section lays down a special rule to govern the particular case in which only *one* party has an Indian domicile, see *Miller v. Administrator-General*, 1 Cal. 412. It should be seen that both this section and the preceding one only deal with the question of the immediate effect of marriage and do not raise question about, or affect the law of succession, see *Hill v. Administrator-General*, 23 Cal. 506 and the notes under the previous sections under the heading "Scope of the section." This section will not apply unless the marriage takes place in British India. "Any property" implies that the character of the property (moveable or immoveable) makes no difference. The section leaves unaffected the rights of the parties to make any arrangement (inconsistent with this section) about their properties by means of a settlement. This section is in fact a modification of and an encroachment upon the *ius gentium* or common law of nations as will appear from the observation of Markby J in *Miller's case* (1 Cal. 412), cited above, as also at p. 40, *post*.

Object of the Section :— Is to avoid as far as practicable the evil of subjecting different kinds of property to different rules of devolution. For instances, a man with English domicile marries in India a woman of Indian domicile possessing moveable and immoveable properties. Now upon marriage the woman acquires the English domicile of her husband (sec. 16), therefore, the consequence will be that the

situs of the moveables will be shifted to England, and the English law which imposes certain disabilities on the woman will apply. Cf. Miller's case, *infra*.

Contrast between Sec. 20 and Sec. 21 :— Under Secs. 20, both the married persons are of Indian domicile, and their rights as to moveables and immoveables are subject to the territorial law of India. But under sec. 21, only one of the marrying parties being of Indian domicile, a change of domicile may result on either side in consequence of the marriage subjecting the parties' moveables to an uncertain course of devolution according as their *situs* is shifted to this or the foreign country. This state of things will follow from the general law of domicile which is of universal application, but this section averts this unhappy consequence of the general law of domicile by enacting a rule which renders marriage altogether ineffective for altering the parties' rights. So Markby J. thus observes in *Miller v. Administrator-General*, 1 Cal. 412 "To that extent the *jus gentium*, or common law of nations, has been set aside or modified. From this point of view it is easy to see why sec 4 (now sec. 20) and sec. 44 (now sec. 21) are kept apart. The two sections deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special rule in a particular case."

Miller v. Administrator General, 1 Cal. 412 : H. M. and C. (a widow), both with English domicile, got married in April, 1866. After marriage, C. inherited as next-of-kin, a share in moveable properties of her son by a former marriage, but this share was not reduced into possession during her life, she dying in 1872 leaving H. M. (husband) and without any lineal descendants. The Court maintained that the English law applied to the case and under that law the husband was entitled to the entire property.

Hill v. Administrator General, 23 Cal. 606 :—A person with an English domicile married a wife of Indian domicile. On the death of the wife the husband was held entitled to inherit the whole of her moveable property to the exclusion of the next-of-kin.

When it does not apply :— This section does not apply to any will made or intestacy occurring before the 1st January, 1866 or to intestate or testamentary succession to the property of any Hindu, Mahomedan, Buddhist, Sikh or Jaina, see sec. 22 (2).

22. [Suc. S 45] (1) The property of a minor may be settled Settlement of minor's property in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from India, with the approbation of the High Court.

(2) [Suc. S. 381] Nothing in this section or in section 21 shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Source of Section :—This section is taken from the Infant Settlements Act, 1855 (18 and 19 Vic. C. 43) under which an infant, not under 20, if a male, and not under 17, if a female, can, in contemplation of marriage make a valid settlement of property (whether real or personal), with the sanction of the Chancery Division of the High Court, Wms. R. P. 289 (20th Ed.).

Nature of the Section :—This is an enabling section. As to the reason why this section was enacted as an enabling section, see Sir Whately Stokes's observation (Stokes 24) cited in Majumdar's Succession at p. 100.

Approbation :—Under this section the intended settlement can be made with the approbation of the minor's father, or if he is dead or absent from India, with that of the High Court.

Procedure :—Approbation should be obtained by means of an application to the High Court on its Original Side.

Proviso :—This section does not apply to (1) a will made or intestacy occurring before the 1st January, 1866 or to (2) intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

PART IV.

OF CONSANGUINITY.

"*Part IV, Clauses 23 to 28* — We have taken the clauses relating to consanguinity from original Part III (intestate succession) and formed them into a separate Part, new Part IV, as in Act X of 1865. The operation of these clauses is not limited to cases of intestate succession" — Notes on Clauses. In this Chapter dealing with consanguinity there is no mention of adoption as creating any kind of relationship whatsoever, *Bambu Kan Singh v. Jogindra Chandra*, I.L.R. (1940) All. 100 = 1940 A.L.J. 1 = A.I.B. 1940 All. 184 = 187 I.C. 170.

23. [Suc. S. 381 and Parsi Intes. Suc. S. 8] Nothing in this Application of Part shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.

situs of the moveables will be shifted to England, and the English law which imposes certain disabilities on the woman will apply. Cf. *Miller's case*, *infra*.

Contrast between Sec. 20 and Sec. 21 :— Under Sec. 20, both the married persons are of Indian domicile, and their rights as to moveables and immoveables are subject to the territorial law of India. But under sec. 21, only one of the marrying parties being of Indian domicile, a change of domicile may result on either side in consequence of the marriage subjecting the parties' moveables to an uncertain course of devolution according as their *situs* is shifted to this or the foreign country. This state of things will follow from the general law of domicile which is of universal application, but this section averts this unhappy consequence of the general law of domicile by enacting a rule which renders marriage altogether ineffective for altering the parties' rights. So Markby J. thus observes in *Miller v. Administrator-General*, 1 Cal. 412 "To that extent the *jus gentium*, or common law of nations, has been set aside or modified. From this point of view it is easy to see why sec 4 (now sec. 20) and sec. 44 (now sec. 21) are kept apart. The two sections deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special rule in a particular case."

Miller v. Administrator General, 1 Cal. 412: H. M. and C. (a widow), both with English domicile, got married in April, 1866. After marriage, C. inherited as next-of-kin, a share in moveable properties of her son by a former marriage, but this share was not reduced into possession during her life, she dying in 1872 leaving H. M. (husband) and without any lineal descendants. The Court maintained that the English law applied to the case and under that law the husband was entitled to the entire property.

Hill v. Administrator General, 23 Cal. 606 :— A person with an English domicile married a wife of Indian domicile. On the death of the wife the husband was held entitled to inherit the whole of her moveable property to the exclusion of the next-of-kin.

When it does not apply :— This section does not apply to any will made or intestacy occurring before the 1st January, 1866 or to intestate or testamentary succession to the property of any Hindu, Mahomedan, Buddhist, Sikh or Jaina, see sec. 22 (2).

22. [Suc. 8 45] (1) The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from India, with the approbation of the High Court.

(2) [Suc. S. 381] Nothing in this section or in section 21 shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Source of Section :—This section is taken from the Infant Settlements Act, 1855 (18 and 19 Vic. C. 43) under which an infant, not under 20, if a male, and not under 17, if a female, can, in contemplation of marriage make a valid settlement of property (whether real or personal), with the sanction of the Chancery Division of the High Court, Wms. R. P. 289 (20th Ed.).

Nature of the Section :—This is an enabling section. As to the reason why this section was enacted as an enabling section, see Sir Whately Stokes's observation (Stokes 24) cited in Majumdar's Succession at p. 100.

Approbation :—Under this section the intended settlement can be made with the approbation of the minor's father, or if he is dead or absent from India, with that of the High Court.

Procedure :—Approbation should be obtained by means of an application to the High Court on its Original Side.

Proviso :—This section does not apply to (1) a will made or intestacy occurring before the 1st January, 1866 or to (2) intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

PART IV.

OF CONSANGUINITY.

"*Part IV, Clauses 23 to 28*—We have taken the clauses relating to consanguinity from original Part III (intestate succession) and formed them into a separate Part, new Part IV, as in Act X of 1865. The operation of these clauses is not limited to cases of intestate succession"—Notes on Clauses. In this Chapter dealing with consanguinity there is no mention of adoption as creating any kind of relationship whatsoever, *Rambir Kaur Singh v. Jogendra Chandra*, I.L.R. (1940) All. 100 = 1940 A.L.J. 1 = A.I.E. 1940 All. 184 = 187 I.C. 170.

23. [Suc. S. 381 and Parsi Intes. Suc. S. 8] Nothing in this Application of Part Part shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.

This Part will not apply to any will made or intestacy occurring before the 1st January, 1866, or to intestate or testamentary succession to the property of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi. For the Exemption of the Parsis, and Sikhs see spt. 8 of the Parsi Intestate Succession Act, (XXI of 1866) and as regards others, see notes under sec. 4, *supra*, and the Notes on Clauses to the Bill.

24. [Sec. S. 20] Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor.

Kindred or Consanguinity:—Is the connection or relation of persons descended from the same stock or common ancestor. It is opposed to relations by affinity which implies connection through marriage, for instance, the husband, wife, step-mother or mother-in-law; see the notes under the heading "Next-of-Kin" below. This Act will not recognise a kindred unless arising from lawful wedlock. *Smith v. Massy*, 80 Bom. 500. Consanguinity is either *lineal* (sec. 25) or *collateral* (sec. 26). "Collaterals agree with the lineal in this that they descend from the same stock or ancestor, but differ in this that they do not descend from the other." *Henderson's Suc* (4th Ed.), p. 30. This section will not apply to the Hindus, see sec. 23, *supra*. So the term "kindred" under the Hindu Law will not have the same meaning attached to it as is given here, *Dinesh Chandra v. Braj Kamini*, 15 O.W.N. 945 (1960), but will include a relation through marriage: *Ibid.*

Next of Kin:—Are persons standing nearest in blood-relationship to the propositus in an ascending or descending line, *Halton v. Foster*, 3 Ch. 505; *Haris v. Newton*, L.J. Ch 299; *Elensley v. Youngh*, 2 M. and K. 780; *Witty v. Gangas*, 10 Cr. and F. 2'5, Cf. secs. 98 and 235, *post*. "Next-of-Kin" and "kindred" are used as synonymous terms; the term "Kindred" ordinarily means a man related by blood. Wms. 881 (10th Ed.). "Next-of-kin" does not include a relation by affinity, so it has been said that the husband and the wife are not next-of-kin, *Milne v. Gilbert*, 2 D. M. and G. 715; *Scott v. Leah*, (1889) W.N. 179; *Watt v. Watt*, 3 Ves. 241; *Carrick v. Lord Camden*, 14 Ves. 376. *In re Fitzgerald*, 58 L.J. Ch. 662; no person can take as next-of-kin unless he has blood relationship with the deceased; so a mother-in-law or a step-mother cannot take as such, *Rutland v. Rutland*, 2 P.W. 216. The expression "next-of-kin *simulicitter*" in a will or a settlement is confined to the nearest in blood to the deceased, *Halton v. Foster*, *supra*; read also *Ram Rani v. Indrani*, 1942 O.W.N. 452=A.I.R. 1942 Oudh, 510=205 I.C. 361. Under sec. 98, a bequest to a next-of-kin is distributed as in a case of intestacy. The Act only contemplates those relationships which the law recognises, that is to say, those springing from a lawful wedlock *Smith v. Massy*, 80 Bom. 500; *Sophia Blin v. Maria David*, 12 Bur. L.T. 48; 10 L.B.B. 77; 51 I.C. 542.

Adoption:—In Part IV which deals with consanguinity, there is no mention of adoption as creating any kind of relationship. Therefore, any custom of

adoption; which might have prevailed among the people of a Sikh convert to Christianity, prior to his conversion, will not any more regulate the rule of succession to the property of such convert in derogation of the provisions of this Act, *Bambir Karon Singh v. Jagindra Chandra*, I.L.R. (1940) All. 100 = 1940 A.L.J. 1 = A.I.R. 1940 All. 184 = 187 I.C. 170. Comp. *Ma Khin v. Ma Alima*, 12 Bang. 184 = A.I.R. 1934 Rang. 72 = 149 I.C. 1148.

25. [Suc. S. 21] (1) Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.

(2) Every generation constitutes a degree, either ascending or descending.

(3) A person's father is related to him in the first degree, and so likewise is his son; his grand-father and grandson in the second degree; his great-grandfather and great-grandson in the third degree, and so on.

Source:—The section is taken from 2 Blackstone's Com. 102 (49th Ed.).

Lineal Consanguinity:—It means the relationship that subsists persons in a direct-line of succession as between grandfather, father, son, grandson and so on. It falls strictly within the definition of *vinculum personarum ab eodem stipite descendenterum*, since lineal relations are such as descend from one another and both, of course, from the same common ancestor, 2 Black. Commentaries, 203 (19th Ed.). Lineal consanguinity and collateral consanguinity are alike in this that they descend from the same stock or ancestor but they differ in this respect that if the line of descent be drawn, it will not be a right line in the case of collaterals as it will be in the other case. *Vide* also the notes under the preceding section. The phrase "lineal descendant" means only descendant born in lawful wedlock, *Sophia Blin v. Maria David*, 12 Bur. L.T. 48 : 10 L.B.B. 77 : 51 I.C. 642; *Smith v. Massy, supra*.

Computation of Degree:—In computing the degree of relationship, every generation (either ascending or descending) is taken as one degree (sub-sec. 2). Thus, father and son are relations of the first degree, grandfather and grandson are those of the second, great-grandfather and grandson are of the third and so on; see sub-sec. (3).

26. [Suc. S. 22] (1) Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

(2) For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is necessary to reckon upwards from the person deceased to the common stock and then downwards to the collateral relative, a degree being allowed for each person, both ascending and descending.

Source:—It is taken from Blackstone's Com., pp. 203-04.

Sub-sec 1 : Collateral Consanguinity—Is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other. Or, in other words, collaterals are relations descended from a common stock or ancestor, but not from each other, as the issue of two sons. Relations of illegitimate birth do not count. *Smith v. Massy*, 30 Bom. 500, *Ds Mollo v. Broughton*, 11 B.L.R. Ap. 6.

Sub-sec. 2 : Computation of Degree—The mode of computation of degree in the collateral line is the same as that of the English Law. In reckoning we are to go upwards from the propositus to the common stock and then downwards to the collateral relation in question, a degree being allowed for each person (both ascending or descending). Or, in other words, we are to trace the succession from the propositus to the collateral via the common ancestor and take the sum total of the degrees in both the lines to the common ancestor. Cf. *Montney v. Petty*, cited in Henderson's Suc. at p. 81.

Difference between Lineals and Collaterals — *Vide* notes under secs. 24 and 25.

27. [Suc. S. 23] For the purpose of succession, there is no

Persons held for purpose of succession to be similarly related to deceased.

(a) between those who are related to a person deceased through his father, and those who are related to him through his mother; or

(b) between those who are related to a person deceased by the full blood, and those who are related to him by the half blood; or

(c) between those who were actually born in the lifetime of a person deceased and those who at the date of his

death were only conceived in the womb, but who have been subsequently born alive.

Analogous Law :—English Statutes of Distribution, 22 and 23 Car. II. C. 10 and 1 Jam. II. C. 17, which however relate only to personal property.

Principle of the Section :—For the purpose of Succession the Act makes no distinction between, (Cl. a) paternal and maternal relation, (Cl. b) full blood and half-blood, (Cl. c) a child actually borne or one in the womb. For the purpose of succession no distinction is also made between moveable or immoveable property.

Half Blood :—For the purpose of succession this section makes no distinction between half-blood and full blood. The half-blood therefore is entitled to administration as well as the full, and the brother of the half-blood will exclude the uncle of the full blood, *Collingwood v. Pace*, 1 Ventr. 424. Similarly the sister of the half-blood and the brother of the full blood are alike entitled to administration, *Brown v. Wood*, Alleyn, 86, Wms. On Executors, 10th Ed 359, 363. Brothers and sisters of the half-blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother after the death of the intestate's father, where the intestate dies without wife or children, *Jessop v. Watson*, 1 My. and K 665. The relationship is always calculated on the strength of blood and not on affinity, so the widow or widower of a blood relation is not taken into consideration, Wms. On Executors, 10th Ed p. 381.

Child Enventre Sa mere :—That is, a child in the womb, for the purposes of succession, is on the same footing as a child actually born, *Doe v. Clarke*, 2 H. Bl 390; *Rawlens v. Rawlens*, 2 Cox 425; *Trover v. Butts*, 1 Sim. and Stu 18; *Pearce v. Carrington* L.R. 8 Ch. 969. For the case of a posthumous child, see *Burnett v. Thatin*, 1 Ves. Sen. 166. The above doctrine placing a child in the womb on the same footing as a child in existence is of general application, whether it be advantageous or disadvantageous to the child, *Wilmer's Trust*, (1903) 1 Ch. 874 (868).

Illegitimate Child :—In this section as in the preceding ones, such a relation has no place, see *Smith v. Massey*, 30 Bom. 500; *De Mollo v. Broughton*, 11 B.L.R. Ap. 6; *Re Sarah Ezra*, 58 Cal. 761—A.I.R. 1931 Cal 560—184 I.C. 443; *Cyril v. J.D. Attiades*, 1940 Bang L.R. 664. Vide also the notes under secs. 24, 25 and 26, *supra*.

28. [Suc. S. 24] Degrees of kindred are computed in the mode of computing of manner set forth in the table of kindred set out degrees of kindred. in Schedule I.

Therefore this Part is partially applicable to the Parsis. "Any other law" in sub-sec. (2) will include Punjab Laws Act. (see A.I.R. 1956 H.P. 17). Therefore, so far as that State is concerned, it will be possible for an Indian Christian there to make a valid adoption so as to alter the rule of succession laid down in this Act, *Sohalal v. Makun*, A.I.R. 1929 Lah. 280-116 I.C. 808. But see *Rambir Karan Singh v. Jogindra Chandra*, I.L.R. (1940) All. 100-1940 A.L.J. 1=A.I.R. 1940 All. 184-187 I.C. 170, cited under the next heading. The words within quotation would save the customary laws of the Garos. *Nabujan v. Paushmoni*, (54 C.W.N. Part II) 2 D.R. 14.

Hindu Convert to Christianity:—This Part will apply to succession to the estate of a Hindu convert to Christianity who dies a Christian and intestate. Such a person cannot elect to continue to be governed by Hindu law in matters of succession, *Kamawati v. Digbijot*, 48 I.A. 381: 48 All. 625-26 O.W.N. 490-42 M.L.J. 87-16 L.W. 1-1922 M.W.N. 386-24 Bom. L.R. 626-A.I.R. 1922 P.C. 14-64 I.O. 559 (P.C.); *Dwarkanath v. Raj Rani* 8 O.W.N. 1198-A.I.R. 1932 Oudh, 85-134 I.O. 872. The rule of succession in relation to the estate of a deceased Sikh convert to Christianity will be as provided for in this Act. The practice or custom of adoption prevailing in the locality is of no avail in that respect. In the absence of anything to show that the convert intended to retain the custom of adoption prevailing in his community before his conversion, succession to his estate would be governed by the provisions of this Act and not by any such custom, nor by sec. 5 of the Punjab Laws Act *Rambir Karan Singh v. Jogindra Chandra*, I.L.R. (1940) All. 100-1940 A.J. 1=A.I.R. 1940 All. 184-187 I.C. 170. Similarly sec. 13 of the Burma Laws Act has been held not to apply to Burman Christians and an adopted child is not an heir to the estate of an adoptive parent dying a Christian, *Cyril v. J. D. Attardes* 1940 Rang L.R. 654. The mere fact that a Hindu convert to Christianity made a declaration that he had become a re-convert to Hinduism was inadequate to make him a Hindu again or to make Hindu law applicable to him, *Ramaya v. Josephine Elizabeth*, 44 L.W. 854-A.I.R. 1937 Mad. 172-167 I.C. 48b.

Jewish Community in Calcutta:—The members of the Jewish community in Calcutta are governed by Part V of the Act. A community cannot assert that the English law on its introduction by the Charter of 1726 was inapplicable to it simply by showing that it had prior to the date of the said Charter its own law differing from English law. If it wants to get out of English law, the community claiming exemption will have to show that English law is based on, or presupposes, social or political conditions peculiar to the country of its origin, *In re Sarah Ezra*, 58 Cal. 761-A.I.R. 1931 Cal. 660-134 I.C. 443.

30. [Suc. S. 25] A person is deemed to die intestate in respect of all property of which he has not made a

As to what property considered to have died intestate. testamentary disposition which is capable of taking effect.

Illustrations.

(i) A has left no will. He has died intestate in respect of the whole of his property.

(ii) A has left a will, whereby he has appointed B his executor; but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

(iii) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(iv) A has bequeathed 1,000 rupees to B and 1,000 rupees to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000 rupees and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1,000 rupees.

Application of the Section:—This section applies to the Parsis, *vide* notes under sec. 29 (2) and *Erasha Karkhasru's* case, below, but not to the Hindus etc., *vide* notes to sec. 29 (1), *supra*.

Its Effect:—The effect of this section is not to destroy the rule of survivorship any more than it extends right on intestacy to property in which the intestate had only a life-estate, *Francis Ghosil v. Gabriel Ghosal*, 31 Bom. 26 (32). Cf. *Tellis v. Saldanha*, 10 Mad. 69.

Intestacy:—A man is said to die *intestate* when he has not made a testamentary disposition which is capable of taking effect. Intestacy may be, (1) *total*, or (2) *partial*. Total intestacy takes place,—(a) when the man dies without leaving any will, (b) when he leaves a will, but the will is incapable of taking effect for the various reasons mentioned in the next paragraph. Partial intestacy takes place where a part only of the beneficial interest is disposed of, e.g. when some of the properties of the testator are excluded from the will. Cf. *Re Cameron*, 26 Ch. D. 19; *Re Skeats*, (1936) ch. 683; *Talbot v. Tevers*, L.R. 20 Eq. 255; *Re Travis*, 1900, 2 Ch. 541; or when the will is restricted only to some particular interest. Thus, a testator creates a life-estate and leaves the remainder undisposed of; this is partial intestacy and he cannot be said to die intestate as regards the remainder, Cf. *Mahim Chandra v. Sarajubala*, 9 O.L.J. 576 (a case of Hindus). Where a testator makes a will with respect to a part of his property, there is intestacy in relation to his other property and his executor will not be his representative in respect of the same. Cf. *Nathu Ram v. Alliance Bank A.I.R.* 1929 Lah. 546-116 I.C. 558. As to the practice of the Bombay High Court when intestacy is contested in a proceeding on an originating summons, see *Hormasji v. Dhan Bai*, 31 Bom. L.R. 511-A.I.R. 1929 Bom. 289.

Capable of taking effect:—A man may leave a will still there may be intestacy, as the will may fail and be incapable of taking effect for various reasons; (a) the will may turn out invalid by reason of some informality, such as want of proper attestation, or by reason of illegality, *Erasha Kaikhasru v. Jerbai*, 4 Bom. 587; *Sivasankara Pillai v. Subramania*, 31 Mad. 517; *Tagore v. Tagore*, 18 W.R. 359: 9 B.L.R. 377. (b) The will may become inoperative, for instance, where the sole legatee and the sole executor predeceases the testator, *Re Ford*, (1902) 1 Ch. 218; *Re Cufa*, (1902) 2 Ch. 500 or if it becomes inoperative by reason of revocation. [N.B.—Where the legatees predecease the testator there is intestacy as to the beneficial interest but not as to the legal estate].

Where a Parsi left a will directing that neither his widow nor his daughter should take any interest but his property should go to a brother; the brother predeceased him; *Held.* (i) the testator died intestate not having left a will capable of taking effect, (ii) the use of a negative word, unaccompanied by any effective disposition of property could not exclude his widow or daughter from succession, *Erasha Kaikhasru v. Jerbai*, 4 Bom. 587: Again, where a testator devised his property to his daughters in equal shares and provided for a gift over in favour of the daughter's son, and the gift over failed for want of a daughter's son to take the bequest, intestacy resulted and the heirs took the property, *Pyari Lal Mullick v. Jugal Kishore Mullick*, 56 Cal. 244—A.I.R. 1929 Cal. 425—118 I.C. 365.

Intestate in Deed:—A man is said to die intestate in deed when he has made no will or if he has made any will at all, the same has become entirely inoperative at the time of his death, see *Re Ford*, *supra* [affirmed in (1902) 2 Ch. 605, O.A.].

Intestate in Law:—He is said to die intestate in law, where he dies leaving a will but without appointing an executor, or where the executor appointed by him fails, Williams *On Executors* (10th Ed.) 370.

CHAPTER II.

RULES IN CASES OF INTESTATES OTHER THAN PARSIIS.

31. [Parsi Suc. S. 8] *Nothing in this Chapter shall apply to Chapter not to apply Parsis.*

Vide sec. 8 of the Parsi Intestate Succession Act (XXI of 1865) quoted at p. 47, *ante* as well the notes thereunder.

32. [Suc. S. 26] *The property of an intestate devolves upon Devolution of such the wife or husband, or upon those who are of the property kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.*

Explanation.--A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

Scope of the Section:--This section makes provision for the devolution of the property of an intestate upon wife (or husband) and the kindred. The order of devolution is laid down in the subsequent sections of this Chapter. The section further provides (in the Explanation) that the wife may be excluded from her share in her husband's estate by means of a settlement before marriage.

Source of the Section:--The rules regulating the devolution and distribution of the intestate's property are taken from those contained in the English Statute of Distributions (22 and 23 Car. II, C. 10) as modified by the Intestates' Estates Act (53 and 54 Vict., C. 29) regarding an intestate's personal property. But in India these rules are applied to both the kinds of property, moveable and immoveable.

Devolution of Intestate's Property:--If a person dies intestate, that is, without making any testamentary disposition of his property, the property *passes* or *devolves* upon the widow (or the widower, as the case may be) and his kindred in the order and according to the share specified hereinafter. It will be seen that in sec. 36 and in the sections that follow, the word "distribution" is used. There is a distinction between these two words. "Devolution" means *passing* or *transmission* of property, whereas "distribution" means *actual division* into shares. This is the reason why in different places these two different words are used. One important point deserves a passing notice. Though the Act is styled "Indian Succession Act," yet excepting in Part II, the word "Succession" is very rarely used, and in its stead we have such words as *devolution* and *distribution*. The reason for this state of things will be found in the fact, that the rules relating to 'devolution' and 'distribution' are taken from the civil law or the statutes of England which make use of these terms in preference to such terms as *succe sion* and *descent*.

Explanation:--This explanation is based on a rule in the English Statute of Distributions (22 and 23 Car. II, C. 10), under which a widow's title may be barred by a settlement before marriage excluding her from her distributive share of her husband's personal estate; and even in the case of a female infant she may be barred of her right by such a settlement, made before marriage with the approbation of her parents or guardian, *vide Williams On Executors*, 10th Ed. pp. 1232-34. The widow will not lose her right to her distributive share by reason of the settlement unless the contract was *ante-nuptial* or *made before her marriage*. As to whether a widow can be deprived of her such right by means of a *post-nuptial*

contract, the question was raised in *Slatter v. Slatter*, Y & C. Exch. 28, but was left undecided. Under the present section, however, the words "before her marriage" clearly show that a widow cannot be deprived of her right to the distributive share of husband's estate by means of a *post-nuptial* contract. The reason for this difference is that the *ante-nuptial* agreement for exclusion is part of the marriage contract, and strictly binds the widow. But the *post-nuptial* contract for such exclusion might smack of undue influence on the part of the husband, and is therefore not countenanced in equity as a modification of the original marriage-settlement. Cf. *Peckering v. Stanford*, 3 Ves. 382. A provision in the husband's will made in lieu of the distributive share does not debar the widow from participating in the husband's estate in case of intestacy resulting from failure of the will, *Garthshors v. Charlie*, 10 Ves. 17, 18.

33. [Suc. S. 27] Where the intestate has left

Where intestate has left widow—

left widow and lineal descendants, or widow and kindred only, or widow and no kindred.

- (a) if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained;
- (b) save as provided by section 33A* if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules hereinafter contained;
- (c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

Widow's Share:—This section ascertains the share of the widow, when she inherits her husband's estate along with or without lineal descendants or kindred of her husband. Her share in the three specified cases in the section will be as follows:—

C1. (a):—Widow and lineal descendants: The widow takes $\frac{1}{3}$ and the remaining $\frac{2}{3}$ goes to such descendants (for their share, *vide infra*).

*The words in italics have been added by the Ind. Succession (Second Amendment) Act (XL of 1926).

Cl. (b):—Widow and kindred: The widow takes $\frac{1}{2}$ and the other $\frac{1}{2}$ goes to the kindred (for their shares *vide infra*).

Cl. (c):—Widow without descendants or kindred: She takes the entire estate.

N.B.—In the case of Cl. (b), the widow's rights under sec. 83A should not be lost sight of.

English Law:—The rule of clause (a) above is in perfect agreement with the rule of English Law on the point.

The rule of clause (b) above is also in conformity with the English rule, subject to a modification introduced by the Intestates' Estates Act (53 and 54 Vict., C. 29), which applies only in cases of total intestacy; *Re Twigg's Estate*, 1892, 1 Ch. 579. Such modification of the English law is as follows: (i) The real and personal estate of every man who dies intestate after the 1st Sept. 1890, leaving a widow but no issue shall go to the widow, absolutely and exclusively, if the value of the estate does not exceed £500; (ii) if such value exceeds £500, then the widow is entitled to £500 with a charge on the estate for this amount (with interest at 4 p.c.); (iii) the provision for the widow is in addition and without prejudice to her right in the residue remaining after payment of the £500: [Cf. sec. 99A, *infra*.]

The rule of Cl. (c) is different from the English law. Under Cl. (c), in the absence of lineal descendants or kindred, the widow takes the entire estate. But under the English law in such circumstances, the widow takes only *one moiety*, the other *moiety* going to the Crown, (see *Caves v. Roberts*, 8 Sim. 214; *Re Bryant*, 1896, P. 169).

Importance of the English Rule:—The provisions of the English law have been given above as they have this importance that if the deceased had an English domicile, succession to his moveables should be regulated thereby under sec. 5 (2), *supra*.

Husband's Share:—Under section 35, *infra*, the rights of a widower are just the same as those of a widow. So the husband's share will be only $\frac{1}{2}$ or $\frac{1}{4}$ as the case may be, or the whole if there be no next-of-kin, *Ganta Daniyalu v. Ganti*, 57 I.C. 854.

N.B.—In England the husband gets the whole of the wife's *personality*.

Effect of this Section:—From the mere fact that this section provides what share the widow is to take in her husband's estate on his dying intestate, it is

not to be understood that this section has the effect of depriving the widow of any inheritance right to dower (under the English law of Dower) or of any other right which had already accrued before the Indian Succession Act came into operation, *vide* the notes at p. 86, *ante*; also *Sarkies v. Prasandmoys*, 6 Cal. 794.

Illustration from decided cases:—(a) *Nepenbala v. Sitikantha Banerjee*; 15 C.W.N. 158: 12 C.L.J. 469: A Hindu adopted Christianity, and died intestate leaving N (widow), M (sister) and S (brother). N claimed the whole estate of her husband under the Hindu Law. *Held*, this Act governed the case, and under it the widow got $\frac{1}{2}$, and M and S got the other half in equal shares (*vide* S. 48, *infra*).

(b) *Stanley v. Stanley*, 1 Atk. 455: The intestate leaves a widow, a mother, nephews and nieces (children of a pre-deceased brother), *held*, the widow takes $\frac{1}{2}$, mother $\frac{1}{4}$, the nephews and nieces, $\frac{1}{4}$.

(c) *Kelway v. Kelway*, 2 P. Wms., 344; the intestate leaves a widow, a mother, three brothers and sisters and two children of a deceased brother: *held*, the widow takes $\frac{1}{2}$, and the rest the other $\frac{1}{2}$, *vide* hereafter.

Bastards:—They have no next-of-kin, therefore Cl. (b) cannot apply to them. In the absence of the lineal descendants the bastard's widow takes the whole property of her husband, but with such descendants she takes only $\frac{1}{2}$. In absence of all these heirs, the property escheats to Government, *vice versa*.

***Sec. 33A [New].** (1) Where the intestate has left a widow, but no lineal descendants and the nett value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.

Special provision where intestate has left widow and no lineal descendants
 (2) Where the nett value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the date of the death of the intestate at four *per centum per annum* until payment.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment

*The section has been added by the Ind. Suc. (2nd Amendment) Act, XL of 1926.

of the said sum of five thousand rupees, with interest as aforesaid ; and such residue shall be distributed in accordance with the provisions of sec. 33, as if it were the whole of such intestate's property.

(4) The nett value of the property shall be ascertained by deducting from the gross value thereof all debts and all funeral and administration expenses of the intestate, and all other lawful liabilities and charges to which the property shall be subject.

(5) This section shall not apply—

(a) to the property of :—

(i) any Indian Christian ;

(ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or

(iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under section 24 of the Special Marriage Act, 1872, regulated by the provisions of this Act ;

(b) unless the deceased dies intestate in respect of all his property.

Source of the Section :—The section has been introduced by Act XL of 1926 and is based on the provisions of the English Statute, 53 and 54 Vict., C. 29 (the Intestates Estates Act), *vide notes* at p. 53 *supra*.

Application of the Section :—The section gives the widow the entire property of the intestate if the latter leaves no lineal descendants and if the value of his property does not exceed five thousand rupees. It does not apply—(a) where there are lineal descendants, or, (b) with respect to the property of any Indian Christian. For definition of Indian Christian see sec. 2 (d), *supra*. "The one question of substance which we were called upon to consider was whether the proposed amendment should apply to Indian Christians. The proposal has evoked considerable opposition from the community concerned, and we have, therefore, exempted them from the provisions of the Bill"—*Report of the Joint Committee*, published them *Gazette of India*, Aug. 29, 1926, Part V, at p. 164. So, the section would not be applicable to Indian Christians, although the deceased was intestate with respect to the whole of the property, *Arulayi v. Antoni Muthu*, (1944) M.W.N. 539—(1944) 2 M.L.J. 220 = A.I.R. 1945 Mad. 47. (c) The section will not also apply unless there is a total intestacy, that is, unless the deceased dies intestate in respect of all his property. Non-application of the section in the case of partial intestacy is perhaps due to the principle that when the husband has made some disposition and ignored the widow,

she does not deserve any further consideration at the hands of the Legislature. Vide also the notes at p. 53 ante, under the heading "The English Law." Clause 5(b) is an independent clause and its effect is not to limit the exemption in favour of an Indian Christian, provided by clause 5(a)(i), simply by reason of the fact that he has happened to die intestate in respect of all his property, *Arulayi v. Antonimuthu, supra.*

Nett value of the Property :—Under sub-sec. (8), such nett value is ascertained by deducting from the gross value of the property all debts and all funeral and administration expenses of the intestate (Cf. S. 321) and all other lawful liabilities and charges to which the property is subject. By such liabilities and charges are meant such things as Government revenue, rents death-bed charges including fees for medical attendance, board and lodging for one month previous to death, (see Secs 320-22, post) and so forth.

The widow's charge :—Under sub-sec. (b), the widow's charge extends to the whole property. The effect of this is that she gets a priority over the unsecured debts of the intestate.

34. [Suc. S. 28] Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained; and, if he has left none who are of kindred to him, it shall go to the Government.

Devolution when no widow :—This section lays down what will happen when the intestate leaves no widow. It consists of three parts—

- (i) If there be no widow, but children (lineal descendants) only, such children take the whole.
- (ii) When there is no widow, nor children (lineal descendants), but only kindred (or next-of-kin), the heritage belongs to the kindred.
- (iii) If there be none of the above persons, the property goes to Government.

English Law :—If there be no widow, the entire property goes to the children or in their absence to the kindred (Cf. Sec. 7 of the Statute of Distributions, *supra*). A child legitimate by the law of its father's domicile, but illegitimate under the English law, is entitled to a share as a next of kin in the personal property of an intestate dying domiciled in England, *Re Goodman's Trusts*, 17 Ch. D. 286.

Escheat to Government:—Government is the *ultimus heres* (the last heir) of all persons, and therefore the property of an intestate leaving no other heirs passes or *escheats* to the Crown now Indian Government, *Dyke v. Walford*, 5 Moo. P.C. 484. Government *inherits* the property, and does not get it as a trustee; or in other words, it comes in not as a person holding a fiduciary character, but as a beneficiary (of course, subject to its paying the intestate's debts), *Megit v. Johnson*, 2 Doug. 548. Government can however by grant return the property to the deceased's relatives (not heirs), after it has escheated to it. The statute 16 and 17 Vic. C. 95, sec 27 has conferred such power of returning the escheats on the Governor General of India, (as representing the Crown). For redistribution of a bastard's property among his relations (who can't legally be next-of-kin) after escheat, *vide post*. The provisions of secs, 214 and 381 are not applicable when the property goes to the Government by Escheat, *Secretary of State v. Girdharī Lal*, 54 All. 226 = 1932 A.L.J. 160 = A.I.R. 1932 All 220 = 136 I.C. 565.

Where the intestate is a Bastard:—In the eye of law a bastard has no next-of-kin; so, if the bastard dies intestate without leaving any widow or children, his *entire* property goes to the Crown, (*i.e.* Government), *Re Bond*, (1901) 1 Ch. 15. If he leaves a widow alone, and no children, the next-of-kin being out of the question, his *entire* property will go to the widow under sec. 33 (c). [*N.B.*—The English Law is somewhat different on this point; in such a case the widow takes $\frac{1}{2}$ and the other $\frac{1}{2}$ escheats to Government, *Cave v. Roberts*, 1897, 8 Sim. 214]. If he leaves a widow and children, sec. 33 (a) applies, *vide at p. 52, supra*. When the bastard's property escheats to the Crown on the failure of heirs, the Crown can by grant return it to his relatives or friends, *vide supra*. Under notification (dated 31-3-1873) published in the *Gazette of India*, 5th April 1873, Pt. IV, p. 334, the Governor-General was pleased to rule that the effects of illegitimate persons dying intestate, which had become escheats since this Act came into operation, should after deduction of the expenses incurred and the established portion of the Crown's share be distributed in conformity with the provisions of this Act.

35. [Suc. S. 43] A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

The Section:—This is old section 43. "We are of opinion that the provisions relating to the rights of a widower are more appropriately inserted here"—
Notes on Clauses.

Analogous Law:—For a similar provision see sec. 219 (e), *post*.

Husband's Share :—*Vide* notes at p. 59, *ante*. Also, *Ganta Daniyeku v. Gunti Yessuratnam*, A. I. R. 1925 Mad. 1110 = 97 I. C. 854. In the absence of the next of kin, the husband will be entitled to the whole of it as her heir, *Ibid.*

Effect of Divorce :—When marriage is dissolved by divorce, all marital rights are at an end, *Prole v. Soady*, L. R. 3 Ch. 220; *Wilkinson v. Gibson*, L.R. 4 Eq. 162. Under sec. 24 of the Indian Divorce Act (IV of 1869), a separated wife is looked upon as an *unmarried woman*, capable of disposing of her property by will, and in the event of her death intestate, her property goes as if her husband was dead. The English Law is also to the same effect. So the word, "husband" in this section will not include a husband judicially separated under the Indian Divorce Act. As to the effect of a non-recognisable custom of divorce prevailing among the Parsi Community, read *Ratanshaw Dinshawji v. Bamanji*, 40 Bom. L. R. 141 = A.I.R. 1938 Bom, 288 = 175 I. C. 200, as also the notes under the heading, "Female Parsi" under sec. 51, *post*.

Distribution where there are Lineal Descendants.

36. [Suc. S. 29] The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.

N.B.—The remaining sections of this Chapter lay down how the intestate's property is to be distributed among his lineal descendants and ascendants and the collaterals.

Distinction between Distribution and Devolution :—Sections 36-49 prescribe rules for *distribution* of property as distinguished from *devolution* of property. For difference between the two terms *vide* notes at p. 51, *ante*. The term "lineal descendants" includes all the descendants and is not restricted to male descendants, *Bhimnath Missir v. Tara Dai*, 49 C.L.J. 594 = 39 C.W.N. 837 = 57 M.L.J. 580 = 30 L. W. 75 = 1929 M. W. N. 639 = A. I. R. 1929 P. C. 162 = 116 I. C. 608, P. C.; *Mir Safdar Ali v. Mirza Maksud Ali*, 34 C.W.N. 209, P.C.

Widow's Share :—In distributing the intestate's property the first step is to deduct the widow's share or the widower's share as the case may be, *vide* sec. 35, *ante*. The widow's share is $\frac{1}{2}$ with lineal descendants and $\frac{1}{2}$ with the next-of-kin. No question of deduction arises, when the widow is *alone*, as she then takes the *whole heritage*.

37. [Suc. S. 30] Where the intestate has left surviving him child or children only a child or children, but no more remote lineal descendant through a deceased child, the property

shall belong to his surviving child; if there is only one, or shall be equally divided among all his surviving children.

The Rule in this Section :—Where the intestate leaves a child or children, but no more remote lineal descendants through a predeceased child, the solitary child alone, or the children (if more than one) in equal shares, take the property.

Child or Children :—Only the legitimate ones can inherit; see pp. 44-46, *ante*. The child or children must be legitimate according to the law, of the country in which the intestate had his domicile at the time of his death. *Doe v. Vardill*, 6 B. & C. 451 (452); *Re Ewin*, 1 Crompt & Jerv. 156; *Re Sarah Ezra*, 58 Cal. 761—A I.R. 1931 Cal. 660=134 I.C. 443. Under sec. 5 (2) *supra*, succession to moveable property is regulated by the law of the country in which the deceased was domiciled at the time of his death. Cf. *Endlin v. Wylie*, 10 H.L.C. 1 (13).

Sex and Age :—of children make no difference—all the descendants in the same degree take equally, the males getting no preference over the females, nor the elder over the younger.

Adopted and Illegitimate Children :—Such children can be included under this section; read the notes above; also *Cyril v. J. D. Allades*, 1940 Rang. L.R. 654, cited at p. 48, *ante*.

Child subsequently legitimised :—In order that a child may be legitimised by the subsequent marriage of its parents, the father must be domiciled both at the child's birth and his marriage in a country which recognises this mode of legitimisation, *Re Grove Voucher v. Solicitor of Treasury*, 40 Ch. D. 216. Cf. *Re Goodman's Trust*, (1881) 17 Ch. D. 266.

Posthumous Child :—has the same rights as a child born during the life time of its father, *Wallis v. Hodson*, 2 Atk. 117; *Re Wilmer's Trusts*, (1903) 2 Ch. 411, vide notes at p. 45 under the heading, "Child en ventre sa mère".

English Law :—A child legitimate by the law of its father's domicile, but not so under the English law is entitled to a share as a next-of-kin in the personal property of an intestate dying domiciled in England, *Re Goodman's Trusts*, (1881) 17 Ch. D. 266.

38. [Suc. S. 31] Where the intestate has not left surviving
Where intestate has him any child, but has left a grandchild or grand-
left no child, but grand children and no more remote descendant through a
child or grandchildren, deceased grandchild, the property shall belong to
his surviving grandchild if there is only one, or shall be equally
divided among all his surviving grandchildren.

Illustrations.

(i) A has three children, and no more, John, Mary and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one-ninth.

(ii) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

The Rule in the Section:—This section prescribes the rule of distribution of the property among the grandchildren, (1) when the deceased leaves no child, and (2) leaves no more descendants through a predeceased grandchild. The mode of distribution is the same as in the case of children. Compare this section with the preceding one.

Grand Children take per capita and not per stirpes. This is evident from the above illustrations (obviously based on the ruling in *Walsh v. Walsh*, 1 Eq. Ca. Abr. 249, pl. 7)

N.B.—Under the old Act there were three illustrations to the section, but the third illustration has now been transferred to sec. 40, which please see.

39. [Suc. S. 32] In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grand-children to him, or are all in a more remote degree.

The Rule in the Section:—It provides for the case where the intestate has left only great-grandchildren or only remoter lineal descendants of the same degree. The principle underlying the mode of distribution is the same as in sec. 37 or 38 (which please see). The great grandchildren also take per capita.

Degree:—The section applies only when the lineal descendants are all of the same degree.

'Sex, age, etc.:—Persons of the same degree take equally without any distinction on the ground of sex, age, etc. Cf. notes at p. 59, ante, under the heading "Sex and Age."

40. [Suc. S. 33] (I) If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who

Where intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote are descended are dead.

either stood in the nearest degree of kindred to him at his decease, or having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease ; and one of such shares shall be allotted in respect of each of such deceased lineal descendants ; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or¹ more remote lineal descendants, *as the case may be* ; such surviving child or children or² more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations.

(i) A had three children, John, Mary and Henry ; John died, leaving four children, and Mary died, leaving one and Henry alone survived the father. On the death of A, intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(ii) A left no child, but left eight grandchildren and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild, and the remaining one-ninth is equally divided between the two great-grandchildren.

(iii) A has three children, John, Mary and Henry ; John dies leaving four children ; and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry, one-third to Mary's child, and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

(iv) A has two children, and no more ; John and Mary. John dies before his father, leaving his wife pregnant. Then A dies leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and the posthumous child.

Descendants not of the same Degree :—Sections 37, 38 and 39 contemplated the cases in which the lineal descendants were all of the same degree, but this section provides for the case when they are not of the same degree. The case of lineal descendants of the same degree is an extremely simple one, they all take equally and per capita. But when they are of different degrees, the succession

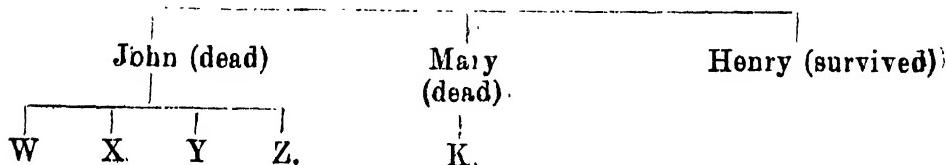
follows a mixed principle of "per capita" and "per stirpes," as will appear from the illustrations attached to the section, which please see:

The Rule in the Section:—The section is somewhat obscure because of the word "either" before the word "stood" occurring for the first time in the section, and its correlative "or" occurring before "having been &c." Reading the section in the light of the illustrations, it appears, that its language would have been clearer if "either" had been omitted and "or" had been substituted by "and". Likewise the two or's marked ¹ and ² in the section should have been and's. However one can gather from the illustration what is meant to be said in the section.

First ascertain the degree of the nearest surviving descendant, whether he is a child, grandchild or great-grandchild. Then ascertain the total number of the persons of such degree, (whether predeceased or surviving), and divide the property into as many shares, and pass on the share reserved for a predeceased child to his lineal, repeating the same procedure at each stage. The illustrations will make the rule clear.

Illustration (i) :

A (The Intestate)



Now applying the above principle, we find that the nearest surviving descendant is a child. The total number of such children (living or dead) is three. Then dividing the estate into three parts, we give—

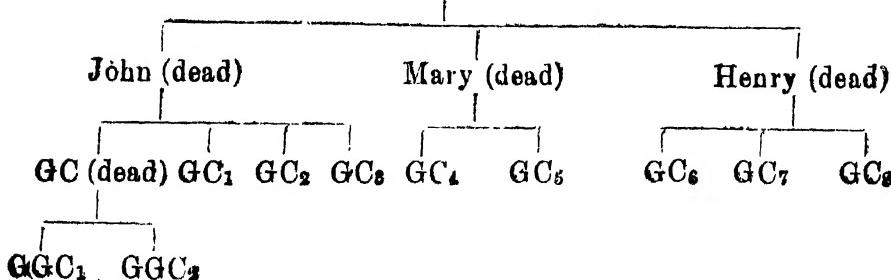
Henry $\frac{1}{3}$

and John's $\frac{1}{3}$ to his four children (W, X, Y and Z)

and Mary's $\frac{1}{3}$ to her child,—K.

Illustration (ii) :

A (The Intestate)

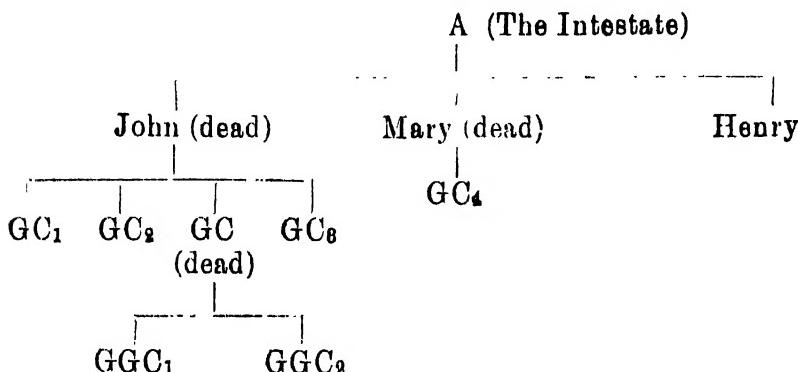


Here no child surviving, the nearest surviving descendants are grandchildren (GC group); the total number of grandchildren (living or dead) is nine; therefore each one of GC group— $\frac{1}{9}$ and each of GGC₁ and GGC₂— $\frac{1}{18}$.

N. B.—The GC's have taken *per capita* and not *per stirpes*. Cf. p. 60, *supra*.

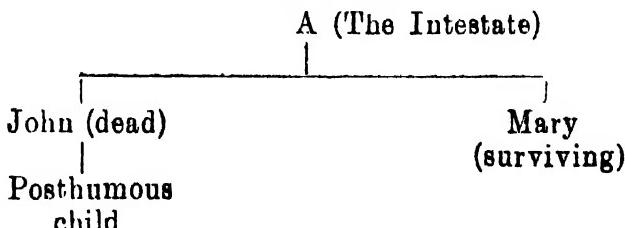
English Law:—With reference to this illustration the English Law is somewhat different. Under that law, in this case the grandchildren would have taken *per stirpes*, so that John group would get $\frac{1}{3}$, Mary group $\frac{1}{3}$ and Henry group $\frac{1}{3}$; Cf. *Re Ross's Trust*, 18 Eq. 286: 41 L. J. Ch., 1801.

Illustration (iii):



Here the nearest surviving descendant is Henry (a child) and the total number of children (living or dead) is *three*. Therefore the property is divided into three parts, and Henry gets $\frac{1}{3}$, Mary's $\frac{1}{3}$ goes to GC4. John's $\frac{1}{3}$ is divided in $\frac{1}{4}$ equal parts, GC1, GC2 and GC3 get $\frac{1}{12}$ each and the dead GC's $\frac{1}{12}$ goes in equal shares to GGC1 and GGC2, that is, each of them gets $\frac{1}{24}$.

Illustration (iv):



Mary gets $\frac{1}{2}$, the posthumous child of John, $\frac{1}{2}$; *vide* Illustration (i), and the notes under the headings "Child *en ventre sa mère*" and "Posthumous Child" at pp. 45 and 59, *ante*.

N. B.—This illustration was formerly illustration (c) of sec. 31 (now section 88) but "has been transferred to clause 40, as illustration (iv) as the illustration

property relates to this clause".—*Notes on Clauses.*

Child, Descendants:—In this section, the share of a predeceased child or descendant goes only to his lineal descendants and not to his next-of-kin, *Bridge v. Abbot*, 3 Bro. C.C. 224: So the share of a predeceased child will go to the grandchildren through such child and not to the child's widow, *Price v. Strange*, (1820) Madd. & G. 159

Distribution where there are no lineal descendants.

41. [Suc. S. 34] Where an intestate has left no lineal descendants,

Rules of distribution where intestate has left no lineal descendants. the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48.

Analysis:—This section and the remaining sections of this Chapter deal with the distribution of the intestate's property when he has left no lineal descendants. The very first step in this behalf is to deduct the widow's share (if any) and to divide the residue in accordance with the provisions of secs. 42 to 48.

Widow's Share:—*Vide* notes under the same heading at p. 62, *ante*. In the absence of lineal descendants her share is $\frac{1}{2}$, besides her rights under the English Intestate Estate Act, 1890 with respect to the moveable property of a person with an English domicile.* Cf. sec. 62), *supra*.

42. [Suc. S. 35] If the intestate's father is living, he shall succeed to the property.

The Rule:—If the intestate's father be living he shall succeed to the property.

Property:—The term in this section means the residue of the intestate's property remaining after the deduction of the share of the widow (if any), otherwise, the entire property.

Father:—In the absence of the wife or any child the father becomes entitled to the estate as next-of-kin in the first degree, *Blackborough v. Davis*, 1 P. Wms. 51. A Hindu father is entitled to succeed to the property of his son who became a convert to Christianity, though the son in his turn, is incapable of inheriting from his Hindu father. The reason for this difference is that the father claims under

*Or, under sec. 38A.

Section 36 of the Act of 1850 makes provision for the debts of the intestate. It provides that the debts of the intestate shall be paid out of his estate, but the debts of the intestate shall not be liable to other general creditors. *General creditors v. Administrators*, 2 Mad. 460.

Administrators General, Madras v. Administrators, 2 Mad. 460. A. a Brahmin adopted Christianity but his father and wife remained Hindus. The wife resided native with him and renounced all her claims on him or his estate. A then took a Christian wife. Upon A's death all these persons set up rival claims. Held, (1) The marriage with the Christian wife during the life time of the Hindu wife was invalid. (2) The Hindu wife refusing to follow the husband lost her rights under Act XXI of 1850. (3) Father alone inherited the whole estate under this section.

(1) [Suc. S. 36] If the intestate's father is dead, but the intestate's mother is living and there are also brothers or sisters of the intestate living and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Illustration

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of his mother but not of his father. The mother takes one-fourth, each brother takes one-fourth and Mary, the sister of half blood, takes one-fourth.

N. B.: In this section also there is some confusion resulting from the use of "or", the substitution of and in its place might improve the meaning. But the illustration makes the whole thing clear.

Application of the Section:—This section will apply only when there are (a) no lineal descendants, (b) no father, and (c) no children of brothers and sisters. If there be a widow, her portion under secs. 32 (and 33A, or under the English Intestate Estate Act, 1900, if applicable) should be first deducted and only the residue divided under this section.

Mother:—The mother has been assigned an inferior position as compared with the father. Cf. sec. 43 above. The reason for this is that the mother might remarry and take the property to the family of her new husband. In England formerly, in the absence of the widow, children and father, the mother could take the whole estate, but for the law which has curtailed her right as now contained by the Section. *Manilal C. D. v. N. C. K. M. & Co.*, 1 P. Wm. 42. The above Section will not however affect the widow who she is there, i.e., where there are

no brothers or sisters or their children. See sec. 46, *infra*. We have already seen (vide notes under sec. 24) that no person can be a next-of-kin unless he or she is in blood relation, and therefore a step-mother cannot be a next-of-kin (Cf. *Rutland v. Rutland*, 2 P. Wms. 216), and consequently the word "mother" in this section will not include her.

Brother and Sister—No distinction is made between them on the ground of sex, age of blood. Cf. notes at p. 59, *ante*, under the heading "Sex and Age." Cf. *Jessop v. Watson*, 1 M. and K. 665; *Burnet v. Mann*, 1 Ves. Sen. 166.

Illustrations

A dies leaving—

(1) Mother	...	...	...	...	...
(2) Brother (John)	...	...	...	...	...
(3) Brother (Henry)	..	...	...	...	...
(4) Uterine sister (Mary) (half-blood)	...	...	...	...	...

44. [Suc. S. 37] If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister of the intestate's father died and his mother, a brother or sister who may have died in the intestate's life-time are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each takes one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

Application of the Section—This section differs from the preceding section only in this respect that it contemplates the existence of children of predeceased brothers and sisters. The mode of distribution is practically the same as in the preceding section, only with this difference that the children of brothers and sisters

takes *per stirpes* the respective shares which their deceased ancestors would have taken if living.

Illustrations.

A dies leaving—

(1) Mother	...	...	...	$\frac{1}{6}$
(2) Brother (John)	...	...	...	$\frac{1}{6}$
(3) Brother (Henry)	...	...	...	$\frac{1}{6}$
(4) Deceased sister's (Mary's) child	...	...	...	$\frac{1}{5}$
(5) Deceased half-brother, George's	...	{ 1st child 2nd child	...	$\frac{1}{10}$ $\frac{1}{10}$ $\frac{1}{10}$

N.B.:—As regards the reason why the mother is denied her position of equality with the father, which she enjoyed prior to 1 Ja. II, C. 17, sec. 7, and as to non-distinction on the ground of sex, age or blood and exclusion of step-mother, *vide* notes under the last section.

45. [Suc. S. 38] If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration,

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister, Mary, and two children of a deceased brother, George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

Application of the Section:—This section differs from the last only in this respect that the brothers and sisters here are all dead. As before, the children of predeceased brothers and sisters take *per stirpes* the share of their respective ancestors.

{ Illustrations.

A dies leaving—

(1) Mother	...	...	...	...	$\frac{1}{2}$
(2) Deceased sister Mary's Child	...	...	...	...	$\frac{1}{2}$
(3) Deceased brother George's	...	{ 1st Child 2nd Child			$\frac{1}{2}$

N.B.:—For notes on other matters, *vide* under sections 43 and 44. But for the presence of the mother, the Children of the brother and sister would have fallen within illus. (iv.) of sec. 48 and taken *per capita* instead of *per stirpes* as here. For the meaning of "children", read *Pett's case*, (1692) 1 P. Wms. 25; *Re-Ross's Trusts*, L. R. 13 Eq. 286.

46. [Suc. S. 39] If the intestate's father is dead, but the

Where intestate's intestate's mother is living, and there is neither father dead, but his mother living and no brother, nor sister, nor child of any brother or brother, sister, nephew or niece. sister of the intestate, the property shall belong to the mother.

Application of the Section:—Unlike the sections 43, 44 and 46, here the brothers and sisters or their children are wanting, and therefore the mother takes the whole estate (of course subject to the rights of the widow, if any). With respect to the brothers' and sisters' line, representation is not carried beyond their children, see *Stanley v. Stanley*, cited at p. 54, *supra*. The Statute, I Ja., II, C. 17 (sec. 7) does not curtail the mother's rights in this extreme circumstance. Cf. notes at p. 65, *supra*.)

47. [Suc. S. 40] Where the intestate has left neither lineal

Where intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Application of the Section:—This section provides for the distribution of the intestate's property among his brothers and sisters and their children (without distinction as to sex, age or blood) in the absence of lineal descendants, and parents (of course, subject to the rights of the widow, if any), and lays down that the brothers and sisters take in equal shares, and that the children of pre-deceased brothers and sisters take *per stirpes* the respective shares of their deceased ancestors.

N.B.:—The brothers and sisters though ranking in the second degree of kindred like grandparents are preferred to the latter. Such is the law also in England, *Winchelsea v. Norcliffe*, 1 Vern. 403; *Evelyn v. Evelyn*, 8 Atk. 762.

Illustration:—A, an intestate, dies leaving one brother, and several children of a pre-deceased sister; here the brother takes $\frac{1}{2}$ and the several children of the sister together, $\frac{1}{2}$. Cf. *Lloyd v. Tanch*, 2 Ves. Sen. 215; *Lewis v. Morris*, 19 Beav. 34.

48. [Sec. S. 41] Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his

Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister. property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Illustrations.

(i) A, the intestate, has left a grandfather and a grandmother and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

(ii) A, the intestate, has left a great-grandfather, or a great-grandmother, and uncles and aunts, no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(iii) A, the intestate, left a great-grandfather, an uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(iv) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They will each take one-eleventh of the property.

Application of the Section:—This section lays down the rules of succession among the next-of-kin, when there are no lineal descendants, parents or brothers and sisters. Note that the children of brothers and sisters are not mentioned; therefore, though the brothers and sisters exclude the grandparents, (*Winchelsea v. Norcliffe*, 1 Vern. 403, *Evelyn v. Evelyn*, 8 Atk. 762), their children cannot do so. The nearest kindred take *per capita*, *Walsh v. Walsh*, Pie. Chanc. 54: Cf. Williams on *Executors*, 10th Ed. p. 1254.

Illustrations.

(i) A dies leaving—

(1) Grandfather	...	...	...	...	$\frac{1}{2}$
(2) Grandmother	...	...	...	...	$\frac{1}{2}$

(3) and (4) Uncles and Aunts (excluded being of 3rd degree).

(ii) A dies leaving—

(1) Great grandmother	...	...	...	...	$\frac{1}{2}$
(2) Uncle	...	...	...	...	$\frac{1}{2}$
(3) Aunt	...	...	...	...	$\frac{1}{2}$

N.B.—All of them are of the same degree and take equally.

(iii) A dies leaving—

(1) Great-grandfather	...	...	...	...	$\frac{1}{2}$
(2) Uncle	...	...	...	...	$\frac{1}{2}$
(3) Nephew	...	...	...	...	$\frac{1}{2}$

N.B.—All of them are of the third degree and take equally.

(iv) A dies leaving—

(1) 10 Nephews through one brother	...	$\frac{1}{11}$	each.
(2) 1 Niece through another brother	...	$\frac{1}{11}$	

N.B.—They are of the same degree and altogether 11 in number; therefore each takes $\frac{1}{11}$. Cf. the illustration to Sec. 45 above.

49. [Sec. 8, 42] Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share.

Object of the Section:—Under the English Law if a child has received an estate by way of settlement from the intestate, or has received any money from him by way of advancement, then, when succession to the intestate's property opens, such child or his descendant is bound to bring the amount so obtained into

hatchpot, so that an equality of distribution may be secured among all the children (or their descendants), see 22 and 23 Car. II, C. 10 (Statute of Distribution), sec. 6; and the object of this section is to render this English rule inapplicable to India. The Law Commissioners thus explain the object of this section in their Report : "We propose to omit the rule of English Law, by which in cases of total intestacy, any thing which a child may have received from the father in his life-time by way of advancement, is deducted from his share of the father's estate. This rule, though founded upon a desire to equalise, as far as possible, the benefit derived by children from their father's property, often fails to effect that object, and proves productive of considerable inconveniences. It tends to encourage minute and difficult investigation of matters of family account, and it frequently interferes with the arrangement of a father who has given property to a child by way of advancement, and yet has not seen fit to make any alteration in his testamentary disposition ; and these evils, which are often felt in England, would be still more felt in India."—*Gazette of India*, July 1st, 1864, p. 53.

Advancement :—An advancement is a provision made by a parent for a child during the parent's life-time. A *legacy* is not an advancement, because it is not a provision secured by the parent in his life-time. In order to make the provision for the child an advancement, it must be secured to the child by an act on the part of the parent completely divesting himself of all proprietary interest in the subject matter of advancement. Actual delivery of the property may however be deferred till a future date. Thus, if by deed the father settles an annuity to commence after his death on one of his children, it is an advancement. *Edwards v. Freeman*, 2 P. Wms. 441. A provision, contingent in character when made may be advancement when the contingency happens, *Ibid.* It is not every payment to the child which is to be regarded as an advancement. The money or fund must be advanced by way of a portion and for a particular purpose with a view to the establishment of the child. *Taylor v. Taylor*, L.R. 20 Eq. 155. Casual presents or payments to the child are not therefore advancements, as not made with the object of advancing the child in life. Cf. *Hatsfield v. Minet*, 2 Ch. D. 186, C.A.; *Pusey v. Desbouys*, 3 P. Wms. 315, and the cases cited therein. Therefore, the essential requirements of an advancement are—(1) payment by way of portion, (2) the payment is made with the object of advancing the child in life, (3) the payment is from parent to child. "Portions" can be given by other persons such as persons in loco parentis (i.e., a person in the position of a parent or a guardian); thus, a husband gives a marriage portion; but an advancement to child can be made by a parent only. When the parent gives large sums of money, they are naturally presumed to be by way of advancement. Cf. *Longton v. Scott*, (1903) 1 Ch. J. C.A. It may be incidentally mentioned that the doctrine of advancement does not apply to this country, and therefore it cannot be called in aid in India to support apparently *benami* transactions in favour of a child; (or a wife): see *Bilas Koir v. Deoraj Banjil*, 42 I.A. 202 : 37 All. 557 : 22 C.L.J. 516 *Bhuban Mohini v. Kumudabala*,

29 C.L.J. 140 : 28 C.W.N. 181; *Sura Lakshmi v. Kotikandarama*, 29 C.W.N. 1019, {P.C.}; read also *Kerwick v. Kerwick*, 47 I.A. 275 = 48 Cal. 260 = 52 C.L.J. 490, P.C.

Rule of Advancement, if applicable to Parsis:—Nothing in this Chapter applies to Parsis, see 81, *supra*. Therefore, this section (s. 49) abrogating the English rule about advancement is inapplicable to the Parsi community; that does not, however, mean that the English rule is revived and put in force so far as that community is concerned, *Dhanjibhai v. Navazbai*, 2 Bom. 75. Ornaments purchased by a Parsi intestate for his daughter-in-law, although with money given to the intestate by her husband, are the separate property of the wife (as it is under the English Law), and the husband has no claim thereagainst, *Ibid.* As to the general non-application of the rule in India, *vide* the cases towards the bottom of the last paragraph.

Settlement:—The term has been thus defined in the Indian Stamp Act (II of 1899), sec 2(24) “Settlement means any non-testamentary disposition in writing, moveable or immoveable property made—

- (a) in consideration of marriage,
- (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
- (c) for any religious or charitable purpose; and includes an agreement in writing to make such a disposition, and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition.”

So, broadly speaking, a settlement is a family arrangement, and its object may at times be fulfilled through the medium of a trust. A settlement is an *executory* or *executed* one according as it leaves something or nothing to be done. It differs from a will in that whereas it comes into operation *at once* (during the very life-time of the settler), the latter comes into effect only *after his death*. Cf. 20 Bom. 210 (F.B.) and the cases cited at pp. 19-14, *ante*. For distinction between a settlement and a gift, see 7 Mad. 349 and 21 Mad. 422.

CHAPTER III

SPECIAL RULES FOR PARSI INTESTATES.

"**Clauses 46 to 52** (now sections 50 to 56) and Schedule II contain special rules as to intestate succession among Parsis"—*Notes on Clauses to the Bill.*

The following seven sections (sections 50 to 56) of this Chapter are a re-enactment of the provisions of the Parsee Intestate Succession Act, (XXI of 1865) which has now been repealed by this Act [see Sch. IX, post], which has now itself been repealed, being superannuated, by the Repealing Act, 1927 (XII of 1927). This Act does not define the extent of the application of these sections, but it seems that the territorial limits of their application will be the same as under the repealed Act (XXI of 1865), which under Sec. 3, of the Laws Local Extent Act (XV of 1874) applied to the whole of India excepting the Scheduled Districts (enumerated in the Sixth Schedule of the said Act—now see the Constitution of India). The Parsee Intestate Succession Act was, by subsequent Regulations and notifications extended to the Arrakan Hill District, Sindh, West Jalpaiguri, Hazaribagh, Lahardaga, Dalbhum, the Kolhan, Kumaon and Garhwal, Mirzapur District, Jaunsar, Bawar, Hazara, Peshwar, Kohat, Bannu, Dera Ismail Khan and Dera Gazi Khan, Ajmere and Merwara Sylhet, Assam (exepting North Lushai Hills), Lahaul, Tareai (N.W.P.).

Before the coming into operation of the Parsee Succession Act, 1865, the law governing Parsees in the Mafnsil was the ascertained usage of the community, modified by the rules of equity and good conscience. In such cases the practice of the English Equity Courts, would, it is true, be followed with necessary modifications, but such reference to English cases would be not for the purpose of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of Equity and good conscience and giving systematic and uniform effect to them, *Shapuryi v. Dossabhai*, 90 Bom. 369 : 7 Bom. L. R. 988.

For Statement of Objects and Reasons of the Parsee Intestate Succession Act, see the Gazette of India, 1865, p. 219 ; for Proceedings in Council, see *Ibid.* pp. 68, 99, 113 and 164.

N. B.: There is no custom of adoption prevalent among the Paraja, *Dhanj bhai v. Kolhabai*, 91 Bom. L. R. 1081 = A. I. R. 1929 Bom. 478 = 121 I.C. 433.

¹[50. For the purpose of intestate succession among Parsis—

General principles relating to intestate succession.

- (a) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive;
- (b) a lineal descendant of an intestate who has died in the lifetime of the intestate without leaving a widow or widower or any lineal descendant or a widow of any lineal descendant shall not be taken into account in determining the manner in which the property of which the intestate has died intestate shall be divided; and
- (c) where a widow of any relative of an intestate has married again in the lifetime of the intestate, she shall not be entitled to receive any share of the property of which the intestate has died intestate, and she shall be deemed not to be existing at the intestate's death.

Intestate:—For the meaning of the term, see sec. 30, *mura*, which applies to the Parsis, under sec. 29. *vide* notes under sections 29 and 30, above.

51. (1) Subject to the provisions of sub-section (2), the property of which a male Parsi dies intestate shall be divided—

Division of a male intestate's property among his widow, children and parents.

- (a) where he dies leaving a widow and children, among the widow and children, so that the share of each son and of the widow shall be double the share of each daughter, or
- (b) where he dies leaving children but no widow, among the children, so that the share of each son shall be double the share of each daughter.

(2) Where a male Parsi dies leaving one or both parents in addition to children or a widow and children, the property of which he dies intestate shall be divided so that the father shall receive a share equal to half the share of a son and the mother shall receive a share equal to half the share of a daughter.

¹ Ss. 50 to 56 substituted by Act 17 of 1939, S. 2 for the original sections (with effect from 12-6-1939).

Illustration:—A Parsi dies leaving two sons and three daughters (*and no widow*). The division of his property will be as follows :—each son, $\frac{2}{7}$ and each daughter, $\frac{1}{7}$.

Here read the notes under sec. 55, *post.*

52. The property of which a female Parsi dies intestate shall be divided—

Division of a female intestate's property among her widower and children.

- (a) where she dies leaving a widower and children among the widower and children so that the widower and each child receive equal shares, or
- (b) where she dies leaving children but no widower, among the children in equal shares.

Where a female Parsi dies intestate and possessed of property, her whole estate, on her death, vests in her husband and children according to the shares specified in this section, *Shapurji v. Rustomji*, 5 Bom. L. R. 252.

Illustration (1):—A female Parsi dies leaving her husband, a son and two daughters. The property will be divided into 4 equal shares, and the allotment will be as follows :—the husband, 1/4; the son, 1/4 and each daughter, 1/4.

Illustration (2):—A female Parsi dies leaving two sons and three daughters; each child will get 1/5.

Female Parsi:—Unlike the provisions of sec. 96, *supra*, the widower and the widow, under this Chapter, are not on the same footing *when there are lineal descendants*, but they enjoy a position of equality when there are no such descendants, see section 54 (a) below. It will be seen that a daughter has a greater interest in the mother's property than in that of the father. Cf. also secs. 52 and 58, *infra*. In this respect a female Parsi's property, to a certain extent, resembles the *stridhan* under the Hindu Law. The custom prevailing among the Parsis resident in Baroda for a husband to divorce his wife by mutual *furus* or releases, assuming it to be a valid custom, cannot be recognised as valid in India for the purpose of determining the right of succession to land in India [read the notes under sec. 5, *ante*], and such a divorce is not a valid divorce under the Indian law for the purpose of deciding questions of succession to immoveable property. *Ratanshaw Dinshawji v. Bamniji*, 40 Bom. L. R. 141=A. I. R. 1938 Bom. 238=178 I. C. 200.

Widower:—The word "widower" signifies a widower relating to the deceased wife only, and without consideration of the fact or possibility of the widower remarrying. Consequently, a husband will inherit the property of his deceased wife notwithstanding his remarriage. *Jehangir v. Pirozbai*, 11 Bom. 1. Vide notes under sec. 54, *infra*.

53. In all cases where a Parsi dies leaving any lineal descendant, if any child of such intestate has died in the life-time of the intestate, the division of the share of the property of which the intestate has died intestate which such child would have taken if living at the intestate's death shall be in accordance with the following rules, namely :—

(a) If such deceased child was a son, his widow and children shall take shares in accordance with the provisions of this Chapter as if he had died immediately after the intestate's death :

Provided that were such deceased son has left a widow or a widow of a lineal descendant but no lineal descendant, the residue of his share after such distribution has been made shall be divided in accordance with the provisions of this Chapter as property of which the intestate has died intestate, and in making the division of such residue the said deceased son of the intestate shall not be taken into account.

(b) If such deceased child was a daughter, her share shall be divided equally among her children.

(c) If any child of such deceased child has also died during the lifetime of the intestate, the share which he or she would have taken if living at the intestate's death shall be divided in like manner in accordance with clause (a) or clause (b) as the case may be.

(d) Where a remoter lineal descendant of the intestate has died during the lifetime of the intestate, the provisions of clause (c) shall apply *mutatis mutandis* to the division of any share to which he or she would have been entitled if living at the intestate's death by reason of the predecease of all the intestate's lineal descendants directly between him or her and the intestate.

N.B.—As to the position of a female Parsi and the character of her property, vide notes under sec. 62, supra.

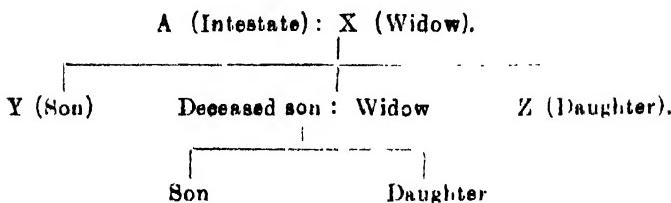
A Parsi made a will bequeathing a sum of money to D (widow of the testator's brother) for her life and provided that after D's death, the money will be distributed among D's children according to the law of succession for the time being in force in the country. After the death of the testator, but during the lifetime of D, two of her children died. Held, (1) that the legacy vested in the children at the time of

the testators' death, so the shares of the deceased children passed on to their heirs, (2) that D was to be taken as the stock, *Pestonji v. KhurshedBai*, 7 Bom. L. R. 207.

54. Where a Parsi dies without leaving any lineal descendant
 Division of property but leaving a widow or widower or a widow of a
 where intestate leaves no lineal descendant, the property of which the
 lineal descendant but leaves a widow or widower the intestate dies intestate shall be divided in
 or a widow of any lineal accordance with the following rules, namely :—
 descendant.

- (a) If the intestate leaves a widow or widower but no widow of a lineal descendant, the widow or widower shall take half the said property.
- (b) If the intestate leaves a widow or widower and also a widow of any lineal descendant, his widow or her widower shall receive one-third of the said property, and the widow of any lineal descendant shall receive another one third, or if there is more than one such widow, the last mentioned one-third shall be divided equally among them.
- (c) If the intestate leaves no widow or widower but one widow of a lineal descendant, she shall receive one-third of the said property or, if the intestate leaves no widow or widower but more than one widow of a lineal descendant, two-thirds of the said property shall be divided among such widows in equal shares.
- (d) The residue after the division specified in clause (a), (b) or (c) has been made shall be distributed among the relatives of the intestate in the order specified in Part I of Schedule II. The next-of-kin standing first in Part I of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.
- (e) If there are no relatives entitled to the residue under clause (d), the whole of the residue shall be distributed in proportion to the shares specified among the persons entitled to receive shares under this section.

Illustration :—A Parsi intestate dies leaving X (widow), Y (son), Z (daughter) and the widow, a son and a daughter of a predeceased son.



The distribution of the estate will be as follows :—X: $\frac{2}{7}$, Y: $\frac{2}{7}$, Z: $\frac{1}{7}$; the deceased son's $\frac{2}{7}$ will be divided [in the manner indicated in sec. 51(a), *supra*] among his widow and children, viz., widow $\frac{2}{5}$ of $\frac{2}{7}$, son, $\frac{2}{5}$ of $\frac{2}{7}$, and daughter, $\frac{1}{5}$ of $\frac{2}{7}$.

Representation :—This section lays down what is commonly known as the doctrine of Representation ; that is, the share of a predeceased child of the intestate does not go to the benefit of the other surviving heirs (as under Mahomedan Law), but passes on to the heirs of such child. The heirs of the predeceased children take *per stirpes*. It is not a condition precedent to the application of this section that the predeceased child should have left both a widow and children. The word "and" in the section should not be so narrowly construed, Cf. *Mancharji v. Mithibai*, 1 Bom. 506, cited at p. 74, *infra*.

Widower :—The word "widower" in this section or in sec. 52 signifies a widower relating to the deceased wife only, and without consideration of the fact or possibility of the widower remarrying. If the framers of the Act had wished to provide against remarriage as in the cases falling under sec. 56 below, they might have used adequate language for the purpose as in the Schedule II, Part II, items 10 and 14, and the omission to employ similar express words for the cases falling under this section is significant, *Jehangir v. Perozbai*, 11 Bom. 1. (Ref. 30 Bom. 359).

55. When a Parsi dies leaving neither lineal descendants nor a widow or widower nor a widow of any lineal descendant, his or her next-of-kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate. The next-of-kin standing first in Part II of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.

Sub-sec. (2) of sec. 51 : This sub-section contemplates the following case—namely, that the intestate has left parents, widow and children. Here the father will be regarded

as a half son and the mother as a half daughter and succession will proceed accordingly.

Mancherji v. Mithibai, I Bom. 506 : A Parsi intestate dies leaving a widow, sons, daughters, one of whom was posthumous and the children of a predeceased son and the widow (W) of another predeceased son, *held*, W, the widow of the predeceased son took $\frac{1}{2}$ of her deceased husband's share in the intestate's property and the other half devolved upon the sons and daughters (including the posthumous one) of the intestate and the children of the other predeceased son, as they were W's husband's brothers and sisters or brother's children, see Sec. 55 (b) with Schedule II, Part I. This case has to be reconsidered in the light of the present law.

N. B.—The Maternal relations have no right under this Part.

56. Where there is no relative entitled to succeed under the provisions of this Chapter to the property of which a Parsi has died intestate, the said property shall be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him.

Application of the Section :—This section applies only in the absence of the widow (or widower) and the lineal descendants. The lineal descendants always come in before and exclude the next-of-kin (including the parents and the brothers and sisters), *Erasha Kaikhasru v. Jerbai*, 4 Bom. 687. The next-of-kin in Schedule II, Part II come in the order in which they are mentioned and take subject to a rule of double portion for males in respect of the relations standing in the same degree of propinquity. Cf. *Hirjibhai v. Barjorji*, 22 Bom. 909. In this case the rule of this section has been best illustrated, *vide infra*.

Next-of-kin :—In this section, this term is synonymous with relatives and is the collective name for all persons mentioned in Schedule II; *vide Hirjibhai v. Barjorji*, 22 Bom. 909.

Hirjibhai v. Barjorji, 22 Bom. 909 : One Jerbai, a Parsi widow died intestate and without issue, her father, mother having predeceased her. Two of her brothers and one sister had left children; some of those children had also predeceased her leaving children (grand nephews and nieces of J). Two of the last mentioned class had also predeceased her leaving children (great-grand nephews and nieces of J). The following table will give a graphical idea of the position of the surviving relations.

			J
1st Brother (dead)	2nd Brother (dead)	Sister (dead)	
Nephew (dead)	Nephew and Nieces	Nephew and Niece	
Grand Nephew	Grand Nephews	Grand Nephews and Nieces, some dying leaving Great- grand-nephews, etc. of J.	
Great Grand Nephews	Great Grand Nieces (A)	Great Grand Nieces	

Held :—(i) First, get three shares, $\frac{2}{5}, \frac{2}{5}, \frac{1}{5}$; of these one $\frac{2}{5}$ for the first brother's line, the other $\frac{2}{5}$ for the 2nd brother's line and $\frac{1}{5}$ for the sister's line.

(ii) Secondly, subdivide these three shares among the remoter descendants having regard to the following rules :—(a) no descendant is entitled to share concurrently with his or her ancestor, e.g. the great-grand niece marked (A) in the Table cannot take as her ancestor is living; (b) at each division and sub-division, each male takes double the share of each female standing in the same degree of propinquity.

(iii) In Part II of Schedule II, the gift to lineal descendants is *substitutional* in the sense that they take nothing if the head of their branch of the family is living whereas if he is dead they stand in his place and take the share which he would have taken.

(iv) In distributing an estate among brothers and sisters and their lineal descendants of such of them as have predeceased the intestate, the primary division must be *per stirpes*. If there are surviving brothers and lineal descendants of a predeceased brother then each surviving brother will take equal shares with the lineal descendants collectively. If all the brothers are dead then the share which each would have taken goes to his lineal descendants. Sister's descendants take her half-share separately.

Dinbai v. Naservang Mehtar, 28 I. C. 481 (Sindh) : A Parsi died leaving a will, having a son, two daughters and heirs of a predeceased daughter. The residue of the estate was to be held in trust, the net income thereof to be paid to his son during his lifetime; in the event of the son's death having no issue but only a widow, a sum of Rs. 10,000 was to be paid absolutely to the widow and the half of the residuary estate was to be appropriated to certain charities and the other half to be divided amongst the heirs according to the Parsi law of succession but excluding the son's widow from getting any share in the distribution. On the death of

the son his widow contended that though she was excluded as heir of the testator, she was not excluded as an heir of the son ; held, the widow was to be entirely excluded whether as heir of the son or otherwise. Cf. *Pestonji v. Khurshedbai*, 7 Bom. L.R. 207.

TABLE OF SUCCESSION AMONG PARISIS.

- A. The widow (or widower), when alone [sec. 54(a)]—half.
 - B. The widow (or widower) with lineal descendants.
 - (1) Widow with Children [sec. 51(a)]—Son : Widow : daughter : 2 : 2 : 1.
 - (2) Widower with Children [sec. 51(a)]—Widower :
 - Son : daughter : 1 : 1 : 1.
 - (3) Only Children.
 - (a) Male's property [sec. 51(b)]—Son : daughter : 2 : 1.
 - (b) Female's property [sec. 52(b)]—Son : daughter : 1 : 1.
 - C. Observe :—In all these cases a predeceased child's heirs will represent him in the matter of distribution of the estate (sec. 53). In other words, children include their heirs.
 - C. The widow (or widower) without lineal descendants.
 - Case (i) : Widow (or widower) $\frac{1}{2}$
 - (Sec. 55-a) : Parents (jointly and subject to the rule of double portion for male, if both be living ; otherwise singly) $\frac{1}{2}$
 - Case (ii) : Widow (or widower) $\frac{1}{2}$
 - (Sec. 55-b) : Paternal relations mentioned in Sch. II, Part I, in order of priority and subject to the rule of double portion for males $\frac{1}{2}$
 - D. Next-of-kin, in Schedule II, Part II, in order of priority and subject to the rule of double portion for males and also subject to the rule of Representation or substitution, where there are no widow (or widower) or lineal descendants (whole).
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PART VI.

TESTAMENTARY SUCCESSION.

CHAPTER I.

Introductory

57. [H. Will, Ss. 2 & 3] The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

Application of certain provisions of Part to a class of wills made by Hindus, etc.

- (a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay ; and
- (b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits ; and
- (c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st day of January, 1927, to which these provisions are not applied by clauses (a) and (b).

Provided that marriage shall not revoke any such will or codicil.

The Section :—The body of the section together with Sch. III is section 2 of the Hindu Wills Act, (XXI of 1870) as amended by section 154 of the Probate and Administration Act, and the Proviso of this section is taken from the first proviso of section 3 of the said Act, the remaining provisions of that sec. (3) being reproduced in the first three restrictions of Schedule III. The words in italics in cl (b) have been newly added in 1929. As to the object of the Hindu Wills Act, see *Alangamonjori v. Sonamoni*, 8 Cal. 687 : 10 C.L.R. 459. For easy reference, the Third Schedule is reproduced here :

*Added by the Ind. Suc. (Amendment) Act, XVIII of 1929. [Consult Act XXXVII of 1926 and XXI of 1928.]

SCHEDULE III.

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57.

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189 and 190.

Restrictions and modifications in application of foregoing sections.

1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any person of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.
2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.
3. Nothing therein contained shall affect any law of adoption or intestate succession.
4. In applying section 70 the words "than by marriage or" shall be omitted.
5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

Application of the Section:—It provides that the sections enumerated above (of this Part) will apply, subject to the aforesaid restrictions and modifications (a) to all wills and codicils made (i) by any Hindu, Buddhist, Sikh or Jains, (ii) on or after the 1st September, 1870, (ii) within the territories, which were, on the 1st September 1870, subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinarily original civil jurisdiction of the Madras and Bombay High

Courts. And (b) to all such wills and codicils made outside the aforesaid territories, so far as they relate to immoveable property within those territories. Cf. *Umakanta Das v. Biswambhar Das*, 8 Pat. 419 = A. I. R. 1929 Pat. 401 = 117 I. C. 874. And (c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st day of January, 1927, to which those provisions are not applied by clauses (a) and (b).

Territorial Limits: This section affects only, (a) the wills made in the territories which were under the Lieutenant-Governor of Bengal on the 1st September, 1870 or which are within the ordinary original civil jurisdiction of the Bombay and Madras High Courts, and (b) the wills made outside but relating to immoveable properties within those territories. A will made within the aforesaid limits comes within the operation of this section even if it relates to properties beyond those limits, *Ranji Ranchod v. Vishnu Ranchod*, 9 Bom. 241; but if the will is made outside these limits and relates to properties not within them, this section will have no application. [*Numberumal Chetti v. Veeraperumal Pillai*, 59 M.L.J. 596 = A.I.R. 1930 Mad. 956 = 128 I.C. 689]. So it has been held that a will made outside the town of Bombay and not affecting any immoveable property within it is valid although it was attested by one witness only, the Act not applying to it, *Bapuji v. Jagannath*, 20 Bom 674. Cf. *Bhagwan Dullah v. Kala Shankar*, 1 Bom. 641. Where the will of a Hindu in Ajmer deals with property in Calcutta, sec. 213 will oblige the legatee to establish his rights by means of a grant of Probate or letters under the Act, *Mukund Kunwar v. Kunwar Umras*, 1941 A. M. L. J. 132. Similarly, an unattested will of a resident of Adyar (beyond the local limits of the ordinary original civil jurisdiction of the Madras High Court) will be valid, *Ratansi v. Administrator-General of Madras*, 52 Mad. 160 = 55 M. L. J. 478 = 28 L. W. 674 = 1928 M. W. N. 849 = A. I. R. 1928 Mad. 1279 = 111 I. C. 364. Likewise, a suit for a pecuniary legacy unconnected with immoveable property in Madras, has been held to be maintainable without a probate, *Numberumal Chetty v. Veeraperumal Pillai* 59 M.L.J. 596 = 1931 M.W.N. 224 = A.I.R. 1930 Mad. 956 = 128 I. C. 689. By reason of this section read with section 213 (2), post, no probate is necessary for a Hindu will made in Ajmer, *Mohri Lal v. Chhagan Mal*, 1945 A.M.L.J. 51. Cf. A.I.R. 1961 Raj 40.

No question of territorial limits arises in relation to the class of wills that falls within clause (c) of the section.

First day of September 1870:—Wills made before that date are not affected by this Act, and therefore they could be valid without the formalities prescribed hereby, provided they were complete instruments, signifying the deliberate intentions of the testator, *Vinayak Narayan v. Govindrao*, 6 Bom. H.C.R. 224; consequently a will prior to 1870 was not required to be signed by the testator, *Ibid*; *Balmakund v. Ramendra Nath*, 60 All 314 = 25 A.L.J. 1073 = A.I.R. 1927 All.

497-104 I.C. 697 Cf. also *Mancherji Pestomji v. Narayan*, 1 B.H.C.R. 77; *Tarachand v. Nobin Chunder*, 9 W.R. 38; or attested by witnesses. *Mancherji Pestomji's case, supra*; *Radhabai v. Gonesh*, 3 Bom. 7; *Balmakund v. Ramendra Nath, supra*. It was not obligatory upon executors and legatees of such wills to take out probate or letters of administration, but probates of such will may be obtained if it is so desired. *Krishna Kinkar v. Rai Mohan*, 14 Cal. 87; *Krishna Kinkar v. Panchuram Mundul*, 17 Cal. 272. But see *Luchmun Bhasti v. Dukharan Bhasti*, 6 C.L.R. 198 Cf. *Shek Moosa v. Sheikh Essa*, 8 Bom. 241. As to the position of an executor under a Hindu will before the Hindu Wills Act, see *Sarat Chandra v. Bhupendra Nath*, 25 Cal. 103.

The date is also important in the matter of ascertaining the territorial limits, because it is with reference to this date that such limits are ascertained.

First day of January, 1927: By reason of the amendment of 1929, the provisions of this Part (as set out in Sch. III) shall, subject to the restrictions and modifications specified in the said schedule, will apply to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after this date, irrespective of any question of territorial limits. Therefore, in view of clause (c) of this section read with sec. 63 of the Act, no oral will could legally be made by a Hindu wherever situated, after the 1st January, 1927, *Ram Sarup v. Nanak Chand*, 2 P.I.R. 826. For the same reason, the rule of sec. 106 can apply to a will made only after January, 1927, *Koppula v. Koppula*, A.I.R. 1960 Andhra, Pr. 369.

Hindus: *vide* notes at p. 18, *supra*.

Buddhists: *vide* notes at p. 19, *supra*.

Sikhs: *vide* notes at p. 19, *supra*.

Jainas: *vide* notes at p. 20, *supra*.

Proviso: Under the English law, marriage is looked upon as a revocation of a will on the idea that, by marrying, the testator has so far changed his previous course of life that he cannot be expected to stand by his original plans indicated in the will. This principle of implied revocation has not been accepted in this country, and hence this proviso. [Read the Statement of Objects and Reasons for Hindu Wills Act (Act XXI of 1870)], also *vide* sec. 69, *infra*. See also *Lakshammal v. Doraisami*, 90 Mad 369; *Vekayamma v. Venkata*, 25 Mad. 658; *Raj Narain Ghose v. Viswanath*, 5 C.W.N. 454.

Restrictions: The application of the sections mentioned in Schedule III above to the will of a Hindu etc. is however subject to several restrictions limiting the testamentary capacity of a Hindu etc. in certain material particulars as will appear from what follows:

A. Restriction as to disposition of property : The application of the specified sections to the will of a Hindu etc. will not so operate as to authorise a testator to bequeath property which he could not have alienated *inter vivos*. Or, in other words, a Hindu's testamentary power of disposition is only co-extensive with his power of alienation during life, see *Ber Pertab v. Rajender Pertab*, 12 M.I.A. 1; *Nagalutahme v. Gopoo*, 6 M.I.A. 309. As a Dayabhaga father of Bengal possesses an absolute power of alienation over all his properties whether ancestral or self-acquired, such unqualified right will be the measure of his testamentary power. Cf. *Tagore v. Tagore*, 9 B.L.R. 377; *Ramtonoo Mullick v. Ram Gopal Mullick*, 1 Knapp. 245. But under the Mitakshara Law, a difference is made between the two kinds of property, ancestral and self-acquired, and the power of alienation with respect to the former kind is very limited, though it is unlimited with respect to the latter. See *Rao Bishen Chand v. Asmaida Koer*, 11 I.A. 164; 6 All. 660; *Sartaj Kuars v. Deoraj Kuari*, 15 I.A. 51; 10 All. 272; *Rao Balwant Singh v. Rans Kishori*, 26 I.A. 54; 20 All. 267; 2 O.W.N. 273, *Ranbir Chand v. Jodha Mal*, 36 P.L.R. 71=A.I.R. 1934 Lah. 764=160 I.C. 311. A bequest by a Mitakshara father to his two sons in Madras ordinarily takes effect as a gift to two co-parceners and not to tenants-in-common, *Shyam Rai v. Purushottam Das*, A.I.R. 1925 Mad. 646=90 I.C. 124, following 24 Mad. 429; 28 Mad. 363. A devise of Mitakshara property with the consent of the coparceners may be upheld, *Venlobu Sah v. Ranganayaki Ammal*, 71 M.L.J. 454=1936 M.W.N. 781=A.I.R. 1936 Mad. 967=168 I.C. 385. It may virtually take effect as a family settlement, *Ranbir Chand v. Jodha Mal*, *supra*. Under the Dayabhaga Law, such unrestricted power of alienation prevails even in respect of an undivided share in the family property, *Janoki Nath v. Mathura Nath*, 9 Cal. 680, F.B. But under the Mitakshara law, by reason of the rule of survivorship, the moment a co-parcener dies, there remains no devisable interest of his in the family property, *Baba v. Timma*, 7 Mad. 357, F.B.; *Tirayya v. Hanumanta*, 14 Mad. 469; *Chamash v. Ram Iroad*, 2 All. 267, F.B. Read the notes under the heading, "Pass by survivorship" under sec. 211, *post*, and under the heading "Joint Hindu family" under sec. 218, *post*. A similar incident is noticeable with respect to the interest of a Hindu woman inheriting properties from another. She has no power of alienation (except for legal necessity) over such properties and her testamentary power with respect to them will be similarly circumscribed. Read *Sombhai v. Jagannan*, 30 Bom. L.R. 987=A.I.R. 1928 Bom. 380=114 I.C. 377. Cf. *Mahomed Shunisool v. Sheukram*, 2 I.A. 7 (14), *Thakoor Dayabec v. Rai Baluk Ram*, 11 M.I.A. 139; also *Pramatha Nath v. Bhulan Mohan*, 39 C.L.J. 421; *Bijoy Gopal v. Krishna Mahishi*, 11 O.W.N. 424 (P.C.); *Sulin Mohan v. Rij Krishna*, 25 O.W.N. 420. As to a widow's rights over the accumulations from her husband's estate in her hands, see *Soorjeemony v. Dinobundhoo*, 9 M.I.A. 123; *Gonda Koer v. Koer Ooddy*, 14 B.L.R. 159; *Grish Chunder v. Broughton* 14 Cal. 861. *Nabakishore Mondal v. Upendra Kishore*, 35 C.L.J. 116: 26 C.W.N. 32? (P.C.). A Hindu widow can will away the promissory notes in her hand which represents the accumulated income of the estate, *Venkatadri Aipa v. Parthasarathi*,

62 I.A. 214 = 48 Mad. 312 = 23 A.L.J. 261 = 48 M.L.J. 627 = 27 Bom. L.R. 829 = 29 C.W.N. 989 = A.I.R. 1925 P.C. 105 = 87 I.C. 924, P.C. If a widow makes a will in respect of a property which she could not alienate *inter vivos*, such will will not be void *ab initio*, and may be valid for purposes of probate, *Bahary Lal v. Juggo Mohan*, 4 Cal. I. 2 O.L.R. 422; *Abhiram Das v. Gopal*, 17 Cal. 48; *Birjnath v. Chunder Mohun*, 19 All. 458. The reason for this rule is that probate cannot be refused simply because there is no estate to be administered, *Adwait Ch. Mondal v. Krishnaphone*, 21 C.W.N. 1129. Cf. *Re Goods of Narsingh Chandra*, 3 C.W.N. 635; *Lalit Chunder v. Baikuntha*, 14 C.W.N. 463; 15 C.L.J. 305. The widow has, however, unrestricted power over her *Stridhan* property which therefore she can validly will away, *Tean Cuwie v. Dino Nath*, 3 W.R. C.B. 49; *Venkata v. Venkata*, 2 Mad. 333 (P.C.); *Munia v. Puran*, 5 All. 310; *Sham Shivendar v. Janki Koer*, 86 I.A. 1; 86 Cal. 811 (P.C.). An imitable estate which is inalienable by custom is also undevisable, *Byjnath Prasad v. Tej Bali*, 43 All. 228; 33 C.L.J. 388; 25 C.W.N. 564 (P.C.). Cf. *Venkata Surja Rama v. Court of Wards*, 26 I.A. 83; 22 Mad. 383; 3 C.W.N. 415 (P.C.); *Sartaj Kuari v. Dewraj Kuari*, 15 I.A. 51; 10 All. 272; *Protap Chandra v. Raja Jagadish Chandra*, 40 C.L.J. 331. Hereditary posts not being alienable according to the wish of the deceased, must necessarily be undevisable, *Nazir Mohamed v. Rabia Bibi*, 1942 A.M.L.J. 47. The equity of redemption is transferable property and is therefore devisable, *Kanti Ram v. Kutuluddin*, 23 Cal 33; *Mata Den v. Kazim Husain*, 13 All. 432, F.R. That is also the case with a lease, see sec. 100, Transfer of Property Act, (IV of 1882). A devise of the rent of land for an indefinite time is equivalent to a devise of the land itself, *Abiba Ali v. Alhaji Mama*, A.I.R. 1942 P.C. 69 = 209 I.C. 561 (P.C.). The expectant interest of a Hindu reversioner is not property and therefore not transmissible, *Amrita v. Gaya Singh*, 45 Cal. 590 (P.C.), 27 C.L.J. 296; *Annada Mohun v. Gour Mohan*, 28 C.W.N. 713; 40 C.L.J. 10, P.C.; *Sham Sundar v. Achhan Kunvar*, 26 I.A. 183. Cf. 29 Cal. 355. As to devise of property burdened with a charge, see *Sivasamy Ayyar v. Tirumudi*, 49 M.L.J. 665 = 1925 M.W.N. 541 = A.I.R. 1925 Mad. 1057 = 90 I.C. 593.

B. *As to power to bar right of maintenance.*—The effect of this section is not to empower the Hindu testator to make a will in derogation of the right of maintenance of another person whom he is under the law bound to support. See *Sonatan Bysack v. Jagut Sundre*, 8 M.I.A. 66, which negatives the husband's power to interfere by will with his widow's right of maintenance; see also *Bechar v. Molhina*, 23 All. 86; *Deli Persad v. Gunwanta Koer*, 22 Cal. 410. Cf. also sec. 39 of the T.P. Act and *Digambari Debi v. Dhankumari*, 10 C.W.N. 1074; 4 C.L.J. 476; *Joytara v. Ramharti*, 10 Cal. 638; *Golop Kunwar v. Collector of Benares*, 4 M.I.A. 246; *Siddessuree v. Jonardan*, 5 C.W.N. 549; 6 C.W.N. 580; *Gekbas v. Lakshmidas*, 14 Bom. 490; *Promotha v. Nagendrabala*, 12 C.W.N. 808. Along with this, read the notes under sec. 391, post.

C. *As to power to create new interest:*—This section will not authorise a Hindu &c. to create in property any interest which he could not have created

before the 1st September, 1870. The words "create any interest" must be read as referring only to the estate or interest which can be given, without reference to the further question to whom it can be given, *Alangamongori v. Sonamoni*, 8 Cal., 157 : 9 C.L.R. 121; or in other words they refer to the quantity or quality of the interest, *Alangamongori v. Sonamoni*, 8 Cal. 637 : 10 C.L.R. 469.

D. As to power to affect law of adoption or law of intestate succession:—The Hindu law of adoption or of intestate succession cannot be interfered with by a Hindu testator by virtue of anything herein contained. Thus, a father cannot, by will previously made, interfere with the rights of a son who might be subsequently adopted by him, *Sartraj Kuari v. Dewraj Kuari*, 16 I.A. 51 : 10 All. 272; From this it will follow that if a will appoints an executor and authorises the widow to adopt, an adoption in pursuance to this authority will change the whole course of devolution of the property, *Venkatachala Mudaliar v. Vedagiri Mudaliar*, A.I.R. 1927 Mad. 782 = 102 I.C. 841. A will cannot authorise an executor to make an adoption on behalf of the testator, *Amrita Lall v. Surnomoyee*, 27 Cal. 996 : 4 C.W.N. 649. The adoption is made by the widow and not the executor, *Srirajan v. Venku Ammal*, 108 I.C. 654. An adoption is made to the husband and therefore an adopted son will not fall within the meaning of the term "issue" when a defeasance clause is provided in favour of a daughter "having issue", *Kannanma v. Machamma*, 1927 M.W.N. 909 = A.I.R. 1928 Mad. 297 = 107 I.C. 497. Where the power to adopt is conferred by a will, non-compliance with the provisions of this Act which renders the will invalid will not invalidate the power to adopt. For the same reason a power to adopt embodied in a minor's will is not rendered inoperative by reason of the invalidity of the will (being made by a minor), *Kondapalli Vijayratnam v. Mandapaka Sudarsana*, 62 I.A. 305 = 48 Mad. 614 = 42 C.L.J. 38 = 30 C.W.N. 193 = 23 A.L.J. 799 : 49 M.L.J. 247 : A.I.R. 1926 P.C. 196 = 89 I.C. 733, P.C. Where an Oudh Talukdar who is governed by Act, 1 of 1869 gave power to adopt to his widow by means of a will, such power would take effect like a power of appointment and the widow will forfeit her such power upon her remarriage, *Abdul Halim v. Raja Saadat Ali*, A.I.R. 1928 Oudh, 155 = 108 I.O. 817. Where a Mahomedan Taluqdar creates under his will a life estate in favour of his widow with power to adopt, the widow may repudiate the life estate and the power to adopt, and such disclaimer terminates her life estate and accelerate the remainder, *Mahomed Azim Khan v. Saadat Ali Khan*, 8 O.W.N. 349 = A.I.R. 1931 Oudh, 177 = 186 I.C. 642. Read also *Nisar Ali Khan v. Mahomed Ali Khan*, 59 I.A. 268 = 7 Luck. 324 = 36 C.W.N. 937 = 1932 A.L.J. 691 = 56 C.L.J. 35 = 34 Bom. L.R. 1299 = 63 M.L.J. 336 = A.I.R. 1932 P.C. 172 = 187 I.C. 589, P.C. A will cannot also alter the line of succession. Cf. *Tagore v. Tagore*, 9 B.L.R. 377; *Purna Sashi v. Kalidhan*, 38 Cal. 603 : 15 C.W.N. 698, P.C.; *Madan v. Labharam*, (1922) Lab. 421. A testator cannot defeat the right of the heir except by a devise, read the notes under sec. 103, post. Prohibition by husband against taking an adoption may be implied from testamentary disposition of his property by the husband, *Panchapakesa*

v. Gopalan, 1938 M.W.N. 1180 = A.I.R. 1939 Mad. 216 = 183 I.C. 877 ; but no such prohibition against adoption can be inferred from the testator emphasising the rights of the brother as the sole surviving co-parcener, Krishnawa Yelogouda v. Ramagouda, 48 Bom. L.R. 488 = A.I.R. 1941 Bom. 360 = 198 I.C. 622.

Restriction No. 4 :—The omission of the words "than by marriage" from sec. 70 when applied to a Hindu will is the necessary corollary of the proviso which renders the English rule of revocation of will by marriage inapplicable in this country. *Vide the proviso, supra.*

Restriction No. 5 :—Is the necessary outcome of the third restriction which leaves untouched the law of adoption. An adopted son, for all practical purposes, has the same status as that of a natural-born son : hence the restriction. To facilitate easy reference, the sections containing the words "child," "children," etc., have been printed in antique types.

58. [Suc. S. 331] (1) The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jaina ; nor shall they apply to any will made before the first day of January, 1866.

(2) [Suc. S. 2] Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India applicable to all cases of testamentary succession.

The Section :—It consists of two sub-sections. The first says to which cases the provisions of this Part will not apply and the second says that excepting the cases contemplated by the first sub-section or by any other law this Part will apply to every other case.

Cases to which this Part does not apply :

It does not apply to—

- (a) Testamentary succession to the property of a Mahomedan.
- (b) Testamentary succession to that of a Hindu etc., *except to the extent mentioned in sec. 57.*
- (c) Wills made before the 1st January, 1866.

Or in other words, this Part does not apply to a Mahomedan will ; it applies to the will of a Hindu etc., only to a limited extent (sec. 57) ; it does not apply to

any will before the 1st January, 1866, by whomsoever made. To other wills it will apply, if such application is not barred by other law. Therefore, the provisions regarding succession contained in Part IV applies to the estates of Confucians, *Leong Hone Waing v. Leong Ah Foon*, 7 Rang. 720=A.I.R. 1930 Rang 42=121 I.C. 796.

Effect of Exclusion of Mahomedans:--Cf. *Sakina v. Mahomed*, 37 Cal. 839; *Syed Abdul v. Badaruddin*, 28 C.W.N. 295.

Proof of Will:--See *Sukumari v. Barat*, 20 C. L. J. 148; an unprobated will may be admitted in evidence for certain purposes. *Achyutananda v. Jagannatha*, 21 C.L.J. 96=20 C.W.N. 122=27 I. C. 739: read the notes under the heading "Admissibility in evidence of unprobated will" under sec. 213, *post*.

CHAPTER II.

OF WILLS AND CODICILS.

59. [Suc. S. 46] Every person of sound mind not being a minor may dispose of his property by will.
Person capable of making wills.

Explanation 1.--A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.--Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.--A person who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.--No person can make a will while he is in such a state of mind, whether arising from *intoxication* or from illness or from any other cause, that he does not know what he is doing.

Illustrations.

- (i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will.

(ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument nor the effect of its provisions. This instrument is not a valid will.

(iii) A being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.

N.B.:—This section applies to Hindus etc.

Who can make a Will:—Every person who is not an *insane* person or a *minor* can make a testamentary disposition. So a married woman can dispose of by will a property, which she could alienate *inter vivos* (Expl. I). Deafness or dumbness by itself does not disqualify a person for the purpose, if not attended with want of understanding (Expl. II). An insane person can make a valid will during lucid intervals (Expl. III). Temporary causes such as intoxication or illness, if suspending the mental capacities, may incapacitate the testator for the time being, (Expl IV). As this section mentions only two disqualifications, insanity and non-age, it seems that even an alien friend or enemy can dispose of property of every description by will, *Mayor of Lyons v. E. J. Co.*, 1 Moo. P.C. 175. The section however does not authorise a person to will away properties over which he has no power of disposition. Any assent by the legatee to abide by the will would not clothe the testator with authority to deal with property over which he had no disposing power, *Paparhai v. Chutermal Mulchand*, A.I.R. 1929 Sind, 19-114 I.C. 105. The validity of a bequest always depends on the testator's power of disposition over the property. *Krishna Kumar v. Rajendra Bahadur*, 56 I.A. 156—4 Luck 122—57 M.L.J. 496—30 L.W. 301—27 A.L.J. 686—A.I.R. 1929 P.C. 121—116 I.C. 397, P.C. An undivided coparcener cannot will away his share of the joint Hindu family property, because of the rule of survivorship taking away the power of disposition, I.L.R. 1953 Mad. 245=A.I.R. 1963 Mad 481. A sonless Saroch Rajput is competent to will away his ancestral property without the consent of his collaterals. There is no custom to the contrary to restrict this such power, *Punjaboo v. Prithvi Singh*, 7 J. & K.L.R. 4. There can be only one last will, though spread over several documents, A.I.R. 1931 Pat. 114.

Power of disposition
necessary to validate
a bequest.

the testator with authority to deal with property over which he had no disposing power, *Paparhai v. Chutermal Mulchand*, A.I.R. 1929 Sind, 19-114 I.C. 105. The validity of a bequest always depends on the testator's power of disposition over the property. *Krishna Kumar v. Rajendra Bahadur*, 56 I.A. 156—4 Luck 122—57 M.L.J. 496—30 L.W. 301—27 A.L.J. 686—A.I.R. 1929 P.C. 121—116 I.C. 397, P.C. An undivided coparcener cannot will away his share of the joint Hindu family property, because of the rule of survivorship taking away the power of disposition, I.L.R. 1953 Mad. 245=A.I.R. 1963 Mad 481. A sonless Saroch Rajput is competent to will away his ancestral property without the consent of his collaterals. There is no custom to the contrary to restrict this such power, *Punjaboo v. Prithvi Singh*, 7 J. & K.L.R. 4. There can be only one last will, though spread over several documents, A.I.R. 1931 Pat. 114.

Every person:—This wording seems to suggest that one will can be made only by one person. In England however two or more persons can jointly execute a will, *Re Stracey*, 1 Jur. N.S. 1177; *Hobson v. Blackburn*, 1 Adams, 274, 278. Cf. *Jethabai v. Parshotam*, 28 Bom L.R. 393; 61 I.C. 400; *Minakshi v. Viswanath*, 83 Mad. 400; a joint will does not however operate as a joint action exactly in the same way as a joint contract, *Hobson's case, supra*. In fact a joint will is equivalent to separate wills of different persons on a common paper.

They may however sometimes operate as mere *compacts*, *Dufour v. Pereira*, 1 Dick, 419; *Walpole v. Lord Oxford*, 3 Ves. 402; Joint Wills are revocable, *Re Stracey's and Hobson's cases, supra*, and to be probated after the death of each testator, if not taking effect after their joint lives. *Re Raine*, 1 Sw. and Tr. 144.

Testamentary Power carries with it power to disinherit:—Testamentary power conceded by this section carries with it the power to disinherit an heir. The testator can prevent his own heir from taking his property, but he cannot prevent the disinherited heir from taking as an heir to his legatee, *Nandram Tahilram v. Motiram Pessumal*, 22 S.L.R. 235 = A.I.R. 1927 Sind, 284 = 108 I.C. 848 Comp. *Khojeh Habibullah v. Ananga Mohan Roy*, 1.L.R. (1942) 2 Cal. 868 = 75 C.L.J. 279 = 46 C.W.N. 719 = A.I.R. 1942 Cal. 671 = 202 I.C. 90.

Testamentary Capacity:—In order to validate a will, the testator must have a testamentary capacity, i.e., a sound disposing mind, *Ibrahim v. Sada Bibi*, 10 I.A. 558 = 30 P.L.R. 634 = A.I.R. 1929 Lah. 20 = 114 I.C. 334. The testamentary capacity of a man is determined by two main conditions, first, the testator should be a man of sound mind, i.e., he must understand and have full appreciation of what he is about, secondly, he must be *sui juris*. He must know what he is doing; read the notes and cases under the heading. "Does not know what he is doing" at p. 96, *post*. The testamentary capacity of a person is always considered with reference to the particular will in question.—"the question being not whether the testator had capacity for will-making, but whether he had capacity to make the will in suit. He may have had capacity to make that will and yet not have had capacity to make a more complex one; or he may not have had capacity to make the will in suit, and yet have had capacity to make a less complex or different one." *Sajid Ali v. Ibadali*, 22 I.A. 171 = 23 Cal. 1 (P.C.); *Saradindu-nath v. Sudhir Chandra*, 50 Cal. 100 : 35 C.L.J. 569 = 69 I.C. 48 Testamentary capacity is always a question *qua* the pertinent will, 67 C.L.J. 71 = A.I.R. 1938 Cal. 674; also A.I.R. 1934 Lah. 628. Testamentary capacity implies a capacity on the part of the testator to comprehend the nature and effect of his act, *Susil Kumar v. Aparsi Debi*, 19 C.W.N. 826 : 20 C.L.J. 601; he must be able to dispose of the property with reason and understanding; this however does not mean that the will he makes is a sensible or a reasonable one, *Ibrahim v. Sada Bibi*, *supra*. If the testator be sufficiently intelligent at the time of execution of the will to understand the provisions of a very simple will, it will, be valid even if the testator might not possibly follow every sentence of it, *Kusum Kumari v. Satishendra*, 18 C.W.N. 1128 : 3 I.C. 787. Cf. *Perera v. Perera*, (1901) A.C. 354; *Namberumal v. Pasumurthy*, 28 I.C. 969; *Jogesh Chandra v. Bhiku San*, 72 I.C. 88 (Cal.); for requisites of testamentary capacity also see 1924 Cal. 612; *Jogesh Chandra v. Bhiku San*, 72 I.C. 88 (Cal.); *Re Monash-h*, 10 Bom. L.R. 1004; *Tayamma v. Sashachalla*, 10 M.I.A. 429; A.I.R. 1953 Cal. 462 [testamentary capacity may be presumptively proved].

Some cases have held that sec. 90 of the Evidence Act raising a presumption of due execution and attestation, impliedly reflects on the existence of testamentary capacity, *Sarat v. Panchanan* A.I.R. 1958 Cal. 471; also A.I.R. 1947 P.C. 16. The testator may be subject to serious infirmities affecting more or less his mental vigor and yet be equal to making his will, *Bannister v. Bannister*, 45 N.J. Eq. 702; *Wescott v. Sheppard*, 51 N.J. Eq. 815, 818. No amount of weakness from age, disease, inebriety or other causes can alone create incapacity, see *Dew v. Clark*, (1826)3 Add. 79; *Osmond v. Fitzray*, 3 P.Wm. 129; *Kcegel v. Egner*, 54 N.J. Eq. 623. Ordinarily, wills are made by the sick and the dying people; therefore, if the physical infirmity were to invalidate a will, then wills will be an impossibility in a great majority of cases; the law only requires a certain degree of understanding notwithstanding the physical infirmity and that is fulfilled if the testator appreciated what he was doing. *Eussoof Ahmed v. Ismail Ahmed*, A.I.R. 1935 Rang, 322=178 I.C. 165. Comp. A.I.R. 1946 Lab. 3. Read also the notes under the heading. "Does not know what he is doing" at p. 96, *post*. Although the mental faculties of a person suffering from paralysis may have been affected by his physical weakness, still he may have capacity to dispose of his property by will, *Sajidali's case, supra*. Thus, a man suffering from tuberculosis and dying the next day after the making of the will, will not be considered to be devoid of testamentary capacity, inspite of his extreme weakness, if it be shown that he himself went to the writer's place for the preparation of his will and himself went to the Registration Office for its registration, *Amir v. Mt. Jallan*, A.I.R. 1934 Lab. 628=148 I.C. 1205; read *Januava Dasi v. Hari Dasi*, 1957 All. L.J. 667. The only two things required under this section are—(1) a sound mind, *vide infra* and (2) adolescence. For further particulars, *vide notes under "Sound Mind," infra*. For importance of draft will in cases of questionable testamentary capacity, see 27 C.W.N. 797 = A.I.R. 1922 P.C. 409 : A.I.R. 1925 Cal. 739.

Sound Mind:—The expression means "a mind of natural capacity not unduly impaired by old age or enfeebled by illness, or tainted by morbid influence," *Smith v. Tebbitt*, 36 L.J.P. & M. 97. See *In re Cowasji Beramji*, 7 Bom. 15. A sound mind is that which is wholly free from delusion, *Dew v. Clark*, (1826)3 Add. 79. *Vide also Austen v. Graham*, 8 Moo. P.C. 493. A mere delusion is not sufficient to deprive a man of testamentary capacity, *Smee v. Smee*, 10 L.J. P. & M. 8. As to what degree of delusion affects testamentary capacity, see *Broughton v. Knight*, L.R. 3 P. and D. 64; *Jenkins v. Morris*, L.R. 14 Ch. D. 674. The expression means that the testator must understand the meaning and nature of the business he is engaged in, *Wormesh Chandra v. Rash Mohini Dasi*, 21 Cal. 279 (291, 298), affirmed in appeal in 25 Cal. 824 : 2 C.W.N. 321; see also *Harwood v. Baker*, 8 Moo. P.C. 282, 290; *Ram Baji Bahadur v. Jagalpal Singh*, 18 Cal. 111. Mere physical weakness or an attack of partial paralysis is no proof of absolute unsoundness so as to completely incapacitate one from executing a will, *Sajidali v. Ibadali*, 22 I.A. 171 : 28

Cal. 1 (P.C.) ; *Dew v. Clark*, (1826) 3 Add. 79 ; *Westcott v. Sheppard*, 51 N.J. Eq. 315. Mere eccentricity or caprice is not enough to constitute mental unsoundness unless it is associated with some sort of delusion, *Suradhan Debya v. Raja Jagat Kishore*, A.I.R. 1939 Cal. 379 = 186 I.C. 88. On the other hand *lack* of consciousness in the testator is not enough, he must have volition and intelligent comprehension, *Woomesh Chandra's case*, *supra* ; *Sala Mahomed Jafferbhoy v. Dame Janbai*, 24 I.A. 148 : 22 Bom. 17 : 1 C.W.N. 481 (488-491). As to what constitutes a sound disposing mind, see generally, *Thompson v. Gordon*, 5 D.L.R. (Mys) 107 ; A.I.R. 1961 Assam, 129 and *Suryanarayanan v. Suramma*, 52 C.W.N. 458 = A.I.R. 1947 P.C. 169. One very important test of *sanity* is whether the testator is capable of governing himself and his affairs. If imbecility, whether congenital or arising from old age or infirmity or illness renders the testator incapable of so governing himself or his affairs, he will be unfit to execute a will, see *Re Cowajit Beramji*, 7 Bom. 15 ; *Sala Mahomed Jafferbhoy v. Dame Janbai*, 24 I.A. 148 : 22 Bom. 17 : 1 C.W.N. 481 ; *Padma Debya v. Dharmadas*, 15 C.W.N. 728. For the test of soundness, read generally, (1913) 108 L.T. 732 ; A.I.R. 1950 All 202 ; A.I.R. 1961 Cal. 369. Mental weakness in order to constitute a testamentary incapacity must amount to incomprehension in relation to the will in question, *Nalagopal Sankar v. Surabala*, 57 C.L.J. 71 = A.I.R. 1933 Cal. 574 = 146 I.C. 414. Eccentricity* is not necessarily tantamount to insanity so as to disqualify a man, *Telkington v. Grey*, (1899) A.C. 401 ; also *Austen v. Graham*, 8 Moo. P.C. 493. Unsoundness in one particular, or partial unsoundness does not imply an all round unsoundness so as to disqualify a testator, *Banks v. Godfellow* L.R. 5 Q.B. 649 ; *Hope v. Campbell*, (1899) A.C. 1 ; (*contra* - *Waring v. Waring*, 6 Moo. P.C. 341)

Minority :—For definition of the term see sec. 2 (e). Also see *Rajcoomar v. Afuzuddin Ahmed*, 8 C.L.R. 419 ; *Stephen v. Stephen*, 8 Cal. 714 : 10 C.L.R. 593. It should be noticed that in sec. 2 (e) a bifurcated definition of the term has been given obviously to cover all cases whether subject to the Indian Majority Act (IX of 1875) or not, vide notes at p. 11, ante. A minor is naturally immature and so unfit to make a will, see *Cossinath Bysack v. Hurrosoondry*, 2 Moul. Dig. 198 (n). Cf. *Bas Gulab v. Thakarilal*, 36 Bom. 622 ; *Krishnamachariar v. Krishnamachariar*, 38 Mad. 166 ; *Beheram v. Somanchi* (1911) 2 M.W.N. 383 : 12 I.C. 667 ; *Dig Koer v. Lakshmi Narayan*, 16 I.C. 6 ; *Re Hardwari Lal v. Gomi*, 33 All. 526. The Judicial Committee have ruled that a minor's will has no legal effect and is not capable of disposing of his estate, *Kondappali Vijayaratnam v. Mandapaku Sudarvana*, 62 I.A. 305 = 48 Mad. 614 = 41 C.L.J. 38 = 30 C.W.N. 193 = 23 A.L.J. 799 : 27 Bom. L.R. 1082 : 49 M.L.J. 247 : (1924) M.W.N. 522 : A.I.R. 1925 P.C. 196 = 89 I.C. 733.

*As an instance of an eccentric will, vide *Morgan v. Boys* 1 Taylor Med. Jur. (5th Ed.), p. 883, where the testator directed his executors to convert his bowels into fiddle, to vitrify his body into lenses for optical purposes, and to utilise his mortal remains for "purposes useful to mankind".

Explanation 1 :—Under the old English Law marriage operated as a transfer of the wife's property to the husband (*vide notes at p. 87, ante*). But this position was altered by the Married Women's Property Act, 45 and 46 Vict., C. 76, under which a married woman is capable of bequeathing as a *feme sole*. The Indian Married Women's Property Act (III of 1874) has also recognised such enlarged powers. This Explanation simply re-iterates the existing law under which a married woman can now dispose of a property which she can alienate *inter vivos*. With respect to the Hindus, the explanation is unnecessary as the *Restrictions* in Schedule III permit testamentary disposition of *Stridhan* property, *vide* at p. 87 *ante*. For a similar provision see para 2 of the Oudh Estates Act (I of 1869).

Explanation 2 : Deaf, Dumb, Blind :—Deaf and Dumb persons are naturally idiotic and therefore can't be expected to have any intelligent appreciation of the execution of a will. But where such persons are intellectually gifted, these physical defects will not disqualify them for the exercise of testamentary powers, *Fairtlough v. Fairtlough*, Milw. Ir. Ecc. R. 491; *Ryan v. Ryan*, 7 C.W.N. 202. There is a natural presumption of incapacity against the deaf and the dumb, but such presumption can be rebutted by proof of power of understanding in them, *Re Goods of Onston* 2 Sw. & Tr. 461. For the case of a blind person, see *Finachum v. Edwards*, 3 Curt 63. For proof of blindness, *read P.C. Appeal No. 7 of 1953 dated 14. 12. 1953 (P.C.)*.

Explanation 3 : Insanity :—It implies such a derangement of the mind as takes away a man's reasoning faculty. *Lunacy* is the other word to indicate such a disordered state of the mind. Medical men have subdivided it into a number of mental conditions such as *mania*, *monomania*, *dementia*, &c, see Taylor Med. Jur. 479; and (1953) 2 All. E.R. 1411. Insanity with all its phases will disqualify an intending testator only when it negatives the existence of a "Sound Mind", which is the cardinal test of a testamentary power under this section. A sound mind is that which is wholly free from delusion, *Dew v. Clark*, (1826) 3 Add. 75 (90). *Vide* also *Austen v. Graham*, 8 Moo. P.C. 493. A mere delusion is not sufficient to deprive a man of testamentary capacity, *Smee v. Smee*, 49 L.J.P. & M. 8. As to what degree of delusion affects testamentary capacity, see *Boughton v. Knight*, 1. R. 3 P. & D. 64; *Jenkins v. Morris*, L.R. 14 Ch. D. 674. The delusion is *insane*, when the belief or conviction in the mind results from facts, which are inherently impossible or are such that no rational man would believe them. See *Prinsep v. Dyce Scobie*, 10 Moo. P.C. 247; *Dew v. Clark*, *supra*. Cf. *Waring v. Waring*, 6 Moo. P.C. 841 [Legal aspect of *monomania* or partial insanity]. Thus, for instance, when a man acts under the belief that he has had a direct command from the Deity, he is under an *insane* delusion, *Hope v. Campbell*, (1899) A.C. 1. "In order to constitute an *insane* delusion, it must be shown not only that belief in the statement was unfounded but that it was so destitute of foundation that no one except an

insane person would have entertained it", *Sajid Ali v. Ibadali*, 22 I.A. 171 : 23 Cal. 1.

Lucid Interval :—This Explanation provides that a person, afflicted with insanity may make a will *during an interval* in which he is of sound mind, or in other words during *lucid interval*, *Re Walker* (1905), 1 Ch. 160 (170). The lucid interval is the period during which the man is free from the disease of insanity and his rationality is restored to him. *Cartwright v. Cartwright*, 1 Philim, 90. "The lucid interval must be a substantial though temporary recovery; a mere cessation of the violent symptoms is not enough, there must be a restoration of the mind sufficient to enable the party soundly to judge of the act", *Hall v. Warren*, 9 Ves 611. As to how lucid interval is to be proved, *vide infra*.

Explanation 4: Drunkenness. Illness :—The essential condition for the validity of a will is that the testator must fully appreciate the significance and effect of his act, *Harwood v. Baker*, 3 Moo. P.C. 282. So any circumstance that might possibly suspend this power of appreciation at the time of his executing the will will affect his testamentary capacity. For instance, drunkenness may for the time being obscure his mental powers or such powers may be so much enfeebled by illness that his power of understanding becomes completely clouded necessarily entailing a temporary suspension of his testamentary capacity. See *Wheeler v. Alderson*, 3 Hagg. Eoo. R. 602 ; *Handley v. Stacey*, 1 F. & F. 574 ; *Bur Singh v. Uttam Singh*, 38 Cal. 855 ; *Boughton v. Knight*, L.R. 3 P. & D. 72 ; *Sala Mahomed Jafferbhoy v. Dame Janbai*, 24 I.A. 148 : 22 Bom. 11 : 1 C.W.N. 481 (P.C.) ; *Womesh Chunder v. Rashmoni* 21 Cal. 279 ; on appeal, 25 Cal. 824. But mere physical weakness without obscuring the intellectual powers will not disqualify the testator, *Saradindunath v. Sudhir Chandra*, 50 Cal. 100. 1923 Cal. 116 ; *Woolmer v. Dily*, 1 Lab. 778 ; *Viswanath v. Rama Chiammal*, 24 M.L.J. 271 : 21 I.C. 724 ; *Anup Singh v. Sahai Singh*, 44 P.L.R. 1915 ; 27 I.C. 749 ; *Naram Das v. Kusum Kumari*, 40 I.C. 597. Cf. also *Perira v. Perira*, (1901) A.C. 354. In order to ascertain what cases fall within "any other cause" the principle of *evidem generis* should not be applied. When the legislature in its wisdom has left a thing to the discretion of the Court, the definition of that thing should not be very rigidly circumscribed. For analogous law under O. XLVII. r. 1, see 39 C.L.J. 247. When a will is challenged on the ground of drunkenness or so forth, the real test of validity will be whether the testator had a proper appreciation or comprehension of the act, *Harwood v. Baker*, 3 Moo. P.C. 282 ; *Prinsep v. Lyce Sombre*, 10 Moo. P.C. 278.

"Does not know what he is doing" :—This, we have seen, is the essential prerequisite of a valid will. Mere knowledge is not sufficient, but should be accompanied by approval of the contents. Cf. *Saradindu Nath v. Sudhir Chandra*, 50 Cal. 100 : 35 C.L.J. 669 : 1923 Cal. 116 ; *Hormusji v. Dhanjishaw*, 12 Bom. L.R. 669.

For this reason, the law requires the reading over and explaining of the will to a *parlanshin* lady. Read the notes against the marginal, "Cases of Pardanashin Ladies" at p. 105, *post*. Cf. *Annada Mohan v. Bhurban Mohini*, 5 C.W.N. 489; *Shambati Koeri v. Jago Bibi*, 29 I.A. 127 : 29 Cal. 749; *Kubar v. Ajodha Prosad*, 7 A.L.J. 445. In order to make a person understand what he is doing, it is not necessary that he should understand the legal niceties involved in his disposition, *Ramesh Ch. v. Lakshman Chandra*, A.I.R. 1961 Cal. 518. A general appreciation of the outlines of the will, though not of its complicated details, may be enough, 28 Bom. L.R. 1068 - 64 I.C. 257; *Charu Chandra v. Kshitish*, A.I.R. 1948 Cal. 361. A testator must not only be able to understand that he is by his will giving his property in a particular way, but he must also have the capacity to comprehend the extent of his property and the nature of the claim of the person he is excluding, *Lila Sinha v. Kumar Bijoy Protap*, 41 O.I.J. 300. Cf. *Harwood v. Baker*, 3 Moo. P.C. 282; *Smith v. Tehitt*, L.R. 1 P. and D., 398 (400); *Smee v. Smee*, L.R. 5 P.D. 84; *Seston v. Hopwood*, (1858) 1 F. & F. 579; *Surendra Krishna v. Ranees Dasi*, 47 Cal. 1048 : 24 C.W.N. 860 and the cases cited therein; also *Boramma v. Parwathamma*, 14 Mys. L.J. 113 - 41 Mys. H.C.R. 269; *Thompson v. Gondon*, 5 D.L.R. (Mys.) 107. If a man acts with full comprehension of what he is doing, the Court will not interfere simply because the provisions in the will are foolish or heartless, *Motibai v. Jamsetjee*, 29 C.W.N. 45 : 19 L.W. 437 : 26 Bom. L.R. 678 : (1924) M.W.N. 173 : 80 I.C. 727 (P.C.). Cf. *Ibrahim v. Sada Ribi*, 10 Lah. 558 - 30 P.L.R. 684 - A.I.R. 1929 Lah 20 - 114 I.C. 884.

If a man was fully conscious when he gave instructions to his lawyer to draw up a will, but was midway between consciousness and unconsciousness at the time of execution, the requirement of the law will be satisfied if he had at that time enough consciousness to understand that he was engaged in executing the will for which he had given instructions, *In re Amulya Kumar Bose*, 42 C.W.N. 649. It will be sufficient if he has followed that his instructions have been carried out. If it is shown that he had a general comprehension about the nature of his property and the nature of his disposition, the state of his family, the claims of the objects of his bounty, his feebleness for the time being will be of little consideration, *Eusef Ahmed v. Ismail Ahmed*, A.I.R. 1988 Rang. 322 - 178 I.C. 165. The fact that the will is a holograph one is strong indication that the testator was fully cognisant of what he was doing, *Santasila Dasi v. Narendra Nath Pal*, 66 Cal. 55 - A.I.R. 1929 Cal. 290 - 121 I.C. 670.

Onus of Proof:—It is for the propounder to prove that the testator had a sound disposing mind, *Rajindar v. Ramjwal*, 5 Lah. 263 : A.I.R. 1924 Lah. 541; followed in *Ghaneswar v. Dutiram*, A.I.R. 1949 Assam, 62; *Shankar Das v. Dhan Devi*, A.I.R. 1993 Lah. 58 - 146 I.C. 241; *Fazal Dad v. Ghulam Sughra*, 32 P.L.R. 782 - A.I.R. 1931 Lah. 459 - 133 I.C. 649; *Earnest Souza v. John Souza*, A.I.R. 1958 Cal. 410; *Muktabai v. Waman*, 69 I.C. 572 : A.I.R. 1923 Nag. 63; *Brojeswari*

Dasi v. Basik Chandra, 85 I.C. 581 (Cal.); *Lila Sinha v. Kumar Bijoy Protap*, 41 C.L.J. 300; *Woomesh Chandra v. Rashmoni*, 21 Cal. 279 (on appeal, 25 I.A. 109: 25 Cal. 824: 2 C.W.N. 321, P.C.); *Bur Singh v. Uttam Singh*, 38 Cal. 355: 15 C.L.J. 72: 15 C.W.N. 177, P.C.; *Chatey Narain v. Ratan Koer*, 22 Cal. 519 (P.C.); *Shunmu-guroya v. Manika*, 36 I.A. 185: 32 Mad. 400: 10 C.L.J. 276 (P.C.); *Dwijendra Nath v. Golak*, 19 C.W.N. 747: 21 C.L.J. 287: 28 I.C. 574; *Bindeshri v. Baisakha Bibi*, 24 C.W.N. 674 (P.C.); *Susil Kumar v. Apsari Debi*, 20 C.L.J. 501: 19 C.W.N. 826: 27 I.C. 276; *Surendra Krishna v. Banee Dasi*, 47 Cal. 1043; 24 C.W.N. 860. The pro-pounder will however have the advantage of a natural presumption that once the execution is proved the testator is to be taken to have intended what he purports to have done by the will, *Fazal Dad v. Ghulam Sughra*, 32 P.L.R. 782=A.I.R. 1931 Lah. 468=193 I.C. 649. That is, in absence of anything to the contrary, mere proof of execution of the will gives rise to a presumption of testamentary capacity. It is only when such capacity is called in question, that a burden of proof thereof is thrown on the propounder, *William Robins v. National Trust Co. Ltd.*, A.I.R. 1927 P.C. 66=101 I.C. 903 (P.C.). Read *Lila Sinha v. Kumar Bijoy Protap*, 41 C.L.J. 300=A.I.R. 1925 Cal. 768=87 I.C. 584. As to the standard of proof to be adduced, see *Ram Gopal v. Aipna Kunwar*, 44 All. 495: 27 C.W.N. 485, P.C. Cf. *Balkunthlnath v. Prasannamoyi*, 27 C.W.N. 797, (P.C.)—(on appeal from 49 Cal. 132: 66 I.C. 782); *Daulat Koer v. Ramphul*, 25 Cal. 459: 2 C.W.N. 177; *Romesh Chander v. Rajani Kanta*, 21 Cal. 1; *Sarojini v. Haridas*, 26 C.W.N. 113 (in this case comparison of handwriting as a mode of proof was deprecated). No presumption of a sound disposing mind arises from the mere fact that an illiterate person puts his thumb mark to a document written by another, *Ibrahim v. Sada Bibi*, 10 Lah. 558=30 P.L.R. 634=A.I.R. 1929 Lah. 20=114 I.C. 384. There is always a presumption in favour of sanity, *Sutton v. Sadier*, 3 C.B.N.S. 96; *Cartwright v. Cartwright*, 1 Phillim. 90: and insanity if alleged, must be proved, *Haji Cassim v. K. B. Dutt*, 19 C.W.N. 45: 27 I.C. 459; *Amanchi v. Aminchi*, 33 I.C. 578 (Mad.). Also 12 I.C. 199. But where the mental condition of the testator is insanity, the person alleging lucid interval must establish it by evidence, *Harris v. Berral*, 1 Sw. and Tr. 153; *Scrubby v. Fordham*, 1 Add. 90; also *Cartwright's case, supra*. As to the other cases of *onus probandi*, see *Tynell v. Painton*, (1894) P. 157; *Berry v. Bullen*, (1838) 2 Moo. P.O. 480 (484); *Sukh Das v. Kedar Nath* 29 Cal. 405; 5 C.W.N. 895. Cf. 15 W.R. 117 *Re Goods of Gopessur Dutt*, 16 C.W.N. 265 (269). The question of *onus probandi* loses its importance when full evidence is gone into on both sides, *Sudhanya v. Gour*, 35 C.L.J. 473; *Krishna v. Nagendrabala*, 34 C.L.J. 333; *Basiruddin v. Mohima Bibi*, 22 C.W.N. 709: 44 I.C. 915; *Seturatnam v. Venkatachala*, 43 Mad. 507; As to when the onus will be considered to have been discharged, see *Lila Sinha v. Kumar Bijoy Protap*, 41 C.L.J. 300=A.I.R. 1925 Cal. 768=87 I.C. 584. If the evidence adduced in the case is sufficient to establish a conclusion of fact, "it cannot matter by which party it was given", *Basanta Kumar v. Secretary of State*, 44 I.A. 113: 44 Cal. 888: 25 C.L.J. 437. Cf. also *Punkajammal v. Secretary of State*, 40 Mad. 108. Existence or

non-existence of testamentary capacity is a question of fact, *William Robins v. National Trusts Co. Ltd.*, A.I.R. 1927 P.C. 66 - 101 I.C. 903 (P.C.). When the trial Court has found that the existence of a sound disposing state of mind has not been established, an appellate Court will be reluctant to interfere with that finding of fact. *Sadachi Ammal v. Rajathi Ammal*, 1939 M.W.N. 651 - A.I.R. 1940 Mad. 315. As to how far registration endorsement can be regarded as proof of testamentary capacity, see 1957 M.P.C. 627 - 1957 M.P.L.J. 755.

Onus when will challenged as forged :—The onus is on the propounder to prove that the will is genuine, *Sukh Dei v. Kedarnath*, 93 Cal. 405 : 5 C.W.N. 895 ; see also *Msmt. Bulli Kunwar v. Bhagirathi*, 9 C.W.N. 649 ; *Thakur v. Madho*, A.I.R. 1924 P.C. 231 : 40 O.L.J. 466. Cf. 24 C.W.N. 674. The attendant circumstances of a will may be taken into consideration for the purpose of scrutinising whether a will is fabricated or not. For example, non-registration of will, disinherition of the natural heir, absence of doctor and lawyer witnesses, non-production of the will in due course, its belated appearance, delay in applying for probate, may all combine to lead to an inference against the genuineness of the will, *Ramanandi Kuer v. Kulawati Kuer* 55 I.A. 18 - 7 Pat. 221 - 47 C.L.J. 171 - 32 C.W.N. 402 - 54 M. L. J. 281 - 30 Bom. L.R. 227 - 26 A.L.J. 986 - A.I.R. 1928 P.C. 2 - 107 I.C. 14 (P.C.). As to how far the thirty year's rule of presumption under sec. 90 of the Ind. Evidence Act is available to establish the genuineness of a will, read A.I.R. 1947 P.C. 15 ; I.L.R. (1948) 1 Cal. 392 - 47 C.W.N. 359 ; A.I.R. 1953 Cal. 471 ; also *Madburi Ghose's Evidence Act*, p. 272.

Insolvent :—Cannot make a will, *Ram v. Soshi*. 11 O.L.R. 189.

60. [Suc. S. 47] A father, whatever his age may be, may by will appoint a guardian or guardians for his Testamentary guardian child during minority.

N. B.—This section does not apply to Hindus etc.

Father :—Only the father can appoint a testamentary guardian, *Ex parte Edwards*, 3 Atk. 517. So under this section, a mother (even if a widow) cannot appoint any such testamentary guardian, *Ibid* ; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103. The English law is however different, because under statute, 49 and 50 Vict. C. 27, sec. 3, a mother can, by a will appoint guardians to act after her own and the father's death. Father's right to appoint a guardian by will (or deed) has been recognised also by sec. 5 of the Guardians and Wards Act (VIII of 1890), [**N. B.**—That section applies where the minor is an European British subject]. The same section concedes such right of appointment even to a mother under certain circumstances, and when both the parents have appointed guardians under that section such guardians act jointly. A Hindu father has been held to be entitled to

appoint a testamentary guardian, *Soobah Pirthee v. Soobah Doorgah*, 7 W.R. 73; but he gets such power not from this section (this section not applying to him), but from his personal law. Cf. *Budhilal v. Morarji*, 31 Bom. 418. A father has no power to appoint a testamentary guardian of his illegitimate children, *Sleeman v. Wilson*, L.R. 18 Eq. 36. As regards care and control of illegitimate children, see (1931) 1 K.B. 317.

Mother:—The Mother has no power to appoint a guardian by will under this section, *vide notes supra*. She can however act as a guardian, *Soobah Pirthee v. Soobah Doorgah*, 7 W.R. 73. Cf. *Jussoda Koer v. Lallah Nettya Lal*, 5 Cal. 48; and in the case of the minor being, an European British subject, she is empowered, by sec. 5 of the Guardians and Wards Act, (VIII of 1890), to appoint by will or deed a guardian for her minor child to act after her death if at the time of appointment the father is dead or incapable of acting. A Hindu mother is not entitled to appoint a testamentary guardian, not because of the disability arising from this section (this section not applying to a Hindu), but because of her personal law. Cf. *Venkayya v. Narasimhulu*, 21 Mad. 401: 8 M.L.J. 112.

Whatever his age might be:—This shows that the father can appoint a testamentary guardian even if he himself be a minor. A minor father can appoint a guardian only by a *will* and not by *deed*, *vide infra*.

By Will:—For the definition of the term, see sec. 2 (b). The will must show the intention of the testator with respect to his property, and such intention must be meant to be carried into effect after his death. It is this combination of the two elements, viz., disposition of property and *post mortem* operation, that gives the "will" a distinct character and distinguishes it from a "deed." This section contemplates only appointment of guardian by *will* and not by *deed*. Under the English Wills Act (as under sec. 59) the will of an infant is invalid, *Kondapalli v. Mandapaka*, 52 I.A. 305 = 48 Mad. 614 = 42 C.L.J. 38 = 30 C.W.N. 193 = 23 A.L.J. 799 = 49 M.L.J. 247 = 27 Bom. L.R. 1082 = A.I.R. 1925 P.C. 196 = 89 I.O. 738, P.C.; and therefore an infant can appoint a guardian only by a *deed*. But under this section his power is restricted to *will*. This position must produce a very curious result, because under sec. 59, *supra*, a minor cannot dispose of property by will [42 C.L.J. 38, P.C.] though under this section he can appoint a guardian by will. The will must contain a declaration with respect to his property. So it follows that the instrument of appointment (by a minor) must take the form of a will though it can't operate as a will as regards the property. Sec 2 (b) at p 12, *ante*.

An instrument appointing a testamentary guardian is valid although attested by the guardian, *Morgan v. Hutchell*, 24 L.J. Ch. 185. Will in this section means a validly executed will. So if the will is invalid, the appointment can be ignored.

and the Court is at liberty to appoint a statutory guardian under sec. 7 of the Guardians and Wards Act (VIII of 1890).

Testamentary Guardian:—A guardian appointed by a *deed* as distinguished from a *will* is not a testamentary guardian and the deed of appointment is not open to probate, *In Bouis Morton*, 33 L.J. 87 : 3 Sw. and T. 422. A testamentary guardian can be appointed in respect of a portion of the property, see *Trevelyan on Minors*, 1906, p. 83. When a guardian is appointed by means of a deed to take effect on the death of the person appointing, the guardian is a testamentary one, *Ex parte Ilchester*, 7 Ves 348; no special form of word need be used in appointing a testamentary guardian; a mere expression of intention is quite enough, see *Simpson on Infants*, 2nd Ed., p. 217; *Miller v. Harris*, 14 Sim. 540; *Mendes v. Mendes*, 1 Ves. 89. A direction to the executors to manage the property during the minority of the child constitutes them testamentary guardians, *In re Srish Chunder*, 21 Cal. 206. Only individuals and not corporate bodies can be appointed such guardians. Cf. *De Mazar v. Pylus*, 4 Ves 644. Probate establishes the authority of the testamentary guardians, *Joyesh Chunder v. Umatura Debba*, 2 C.L.R. 577; such a guardian is entitled to grant of Administration, *Re Goods of Morris*, 2 Sw. & Tr. 360. But such appointment can be proved by other evidence, if no probate has been taken of the testament, *Pathan Ali Khan v. Bai Pani Bai*, 19 Bom. 832. When a guardian is appointed by will, no one else should be appointed guardian under sec. 7 of the Guardians and Wards Act, (VIII of 1890), *Sayed Salu v. Hapija Begum*, 17 Bom. 560. Cf. *Alugappa v. Mangathayi*, 40 Mad. 672 : 30 M.L.J. 504 : 84 I.C. 766. Cf. 21 Cal. 206 (*supra*). Where there are two or more testamentary guardians, on the death of one, the rest take the office by survivorship, *Eyre v. Shaftesbury*, 2 P. Wms. 102. As to a minor's power to appoint a testamentary guardian, see *supra* at p. 100.

61. [Suc. S. 48] A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Will obtained by fraud, coercion or importunity.

Illustrations.

(i) A falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour; such will has been obtained by fraud, and is invalid.

(ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

(iii) A, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(iv) A threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a will yet being so much under the control of B that he is not a free agent, makes a will, dictated by B. It appears that he would not have executed the will but for fear of B. The will is invalid.

(vi) A being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a will of a certain purport and does so merely to purchase peace and in submission to B. The will is invalid.

(vii) A being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B.

(viii) A, with a view to obtaining a legacy from B, pays him attention and flatters him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

N. B.--This section applies to Hindus etc.

The Section :--When a person is induced to make a will by fraud, coercion or undue influence, it is void. This is the general law on the effect of fraud etc. upon a will, *Khas Mehal v. Administrator-General*, 5 C.W.N. 505; and is of universal application, *Msmt Bali v. Husain Bibi*, 55 P.R. 1894. Under this section a part of a will may fail by reason of fraud, coercion &c. though the other part may be valid and admitted to probate, see *Girish Chandra v. Rashoraj*, 1 C. L. J. 109; *Allen v. McPherson*, 1 H.L. 191; *Wood v. Wood*, 1 Phill., 367; *Rhodes v. Rhodes*, L.R. 7 App. Case, 191; if the rejection of the part tainted with fraud affect the meaning of the other part of the will as well, the whole will falls through, vide the above cases; also *Harter v. Harter*, L.R. 3 P. & D. 11; *Re Gordon*, (1892) P. 228; *Re Moore*, (1892) P. 378.

Fraud :—For definition compare sec. 17 of the Indian Contract Act, (IX of 1872). Fraud always implies one or more of the following things: Misleading a person by a false suggestion; inducing a man to take a particular course of action by misrepresentation; active concealment of fact; connivance with a view to mislead or to deceive; encouraging false belief, false notion; inducing a man to do or refrain from doing anything by means of a promise without any intention of performing it; silence or connivance when there is an obligation to speak; and so forth. Whether an act is fraudulent or not always depends upon its surrounding circumstances and must be determined with reference to the facts of each case. The following cases may be consulted with respect to this subject, *Allen v. McPherson* 1 H. of L. 191; *Boyse v. Rossborough*, 6 H.L.C. 2; *Re Oswald*, L.R. 3 P. & D. 162; *Re Moore*, (1892) P. 578; *Morrell v. Morrell*, 7 P.D. 68; Cf. also 1 Cal. 330; 3 Cal. 324; 8 All. 267; 18 Mad. 214; 14 All. 8; 6 C.W.N. 816; 18 Cal. 545.

Coercion :—For meaning of the term compare sec. 15 of the Indian Contract Act. It always implies the application of some force or pressure, so as to take away the free agency of a man. It corresponds to *duress* of the English law. Cf. *Guthrie v. Abdul Mozaffer*, 14 M.I.A. 53; using actual force to compel a testator to make his will is coercion and invalidates the will, *Mountain v. Bennet*, 1 Cox, 355. As to the effect of coercion on instruments in general, see *Bal Gangadhar Tilak v. Shrinivas*, 42 I.A. 135: 99 Bom. 441; *Kanhaiya Lall v. National Bank of India*, 40 I.A. 56: 40 Cal 598. As to what constitutes coercion, see *Chikkam Amiraju v. Chikkan Seshdyya*, 41 Mad. 33. 40 I.C. 352. Coercion, undue influence etc. are distinct things although they may overlap one another, *Bal Gangadhar v. Shrinivas*, 42 I.A. 135: 99 Bom. 441: 19 C.W.N. 729: 22 O.L.J. 1 (P.C.).

Undue Influence :—As to the meaning of the term, sec. 16 of the Indian Contract Act may be referred to. The Act does not make use of this familiar expression but simply speaks of "an importunity as takes away the free agency of the testator." So, in order to invalidate a will, two things must be present, (1) an importunity or an influence, and (2) it should be of such a character as to take away the free agency of the testator, *Kindleside v. Harrison*, 2 P. William, 551-52. A man retains his free agency so long as he is capable of exercising his free volition in any way he likes. This however does not mean that he can flout the law. Letters of law are not inconsistent with his free agency, Comp. *Kedar Nath Poddar v. Gayanath Poddar*, 52 O.L.J. 165=A.I.R. 1930 Cal. 731. Mere exertion of influence will not invalidate the will; but the influence must be undue, so as to take away the free agency of the testator; read (1868) 1 P.D. 481—relied on in A.I.R. 1956 Madh. B. 246; also *Sarat Chandra v. Panchanan*, A.I.R. 1958 Cal. 471; *Naresh Chiran v. Puresh*, 1955 S.C.J. 299=1955 S.C.A. 360=A.I.R. 1955 S.C. 363. The expression does not admit of any hard and fast definition, and should be adjudicated upon according to the circumstances of each case, *Allcard v. Skinner*, L.R. 36 Ch.

188. Cf. *Hall v. Hall*, L.R. 1 P. & D. 482; *Mountain v. Bennet*, 1 Cox. 855; *Boyse v. Rossborough*, 6 H.L.C. 2, 6; *Bur Singh v. Uttam Singh*, 38 Cal. 355: 18 C.L.J. 72; 15 C.W.N. 177; *Abbas Hossain v. Kurralatuam*, 31 Cal. 186; "whatever influence constrains a person to do what is against his will, and what he would not do, if left to himself, is undue influence," *Wingrove v. Wingrove*, 11 P.D. 81; *Carrel v. House*, 48 N.J. Eq. 269. Undue influence is distinct from coercion, but may overlap it. Cf. *Bulgangadhar's case*, under the last paragraph. Acts to constitute undue influence must amount to coercion, *Sala Mahomed Jafferhoy v. Dame Janbai*, 22 Bom. 17: 1 C.W.N. 481 (P.C.). Cf. also *Bur Singh v. Uttam Singh*, 38 Cal. 355; *Bandains v. Richardson*, (1906) A.C. 169. An undue influence contemplated by this section must be one as will dominate the action of the testator. Cf. *Raja Bejoy Singh v. Kumud Kanta*, 23 C.W.N. 690: 49 I.C. 794; also *Poosathurai v. Kannappa*, 47 I.A. 1. 43 Mad 546; *Ramkrishna v. Naraina*, 11 L.W. 112; also A.I.R. 1961 Punj 411. Read also 48 I.C. 32 (Oudh). As to how far excessive persuasion or moral coercion be regarded as undue influence, see *Kanga v. Kanga*, 29 C.W.N. 45=26 Bom. L.R. 579=22 A.L.J. 98=A.I.R. 1924 P.C. 28=80 I.C. 777 (P.C.). Where the husband was not deprived of his judgment and volition by reason of the influence of the wife there was no undue influence, *Morison v. Administrator-General*, 7 Mad. 515, following *Boyse v. Rossborough*, *supra*. Cf. *Bandains v. Richardson*, *supra*. Every exertion of influence is not culpable unless irresistible, *Jajneshwari v. Ugrashwari*, 11 C.W.N. 824; all relations of affection and love exert some sort of influence no doubt, but in order to be culpable it must take away the free agency of the testator. Cf. *Perkins v. Perkins*, 90 N.W. 55; *Morison's case*, *supra*; 63 Punj L.R. 193. Even a dear person's solicitations will not be undue influence, if not transgressing the bounds herein limited. *Raja Rajeswara v. Kuppuswami*, 41 M.L.J. 494; *Narayana v. Kurum*, 40 I.C. 697 (Pat.). Law does not brand *due* influence; it stigmatizes only the *undue* one. Nor so is mere flattery without use of misrepresentation or practice of fraud, *Mt. Purbiti v. Sheobali*, A.I.R. 1926 Oudh, 262=91 I.C. 159. The position may be different when the matter excites suspicion of the Court, A.I.R. 1961 Cal.=359. Where there is no sufficient intrinsic evidence of improbability and no evidence to show coercion in the special matter of the codicils in question, general evidence as to wife's force of character and the husband's weakness and of their difference went for little, *Sala Mahomed Jafferhoy v. Dame Janbai*, 22 Bom. 17: 1 C.W.N. 481 (P.C.). For the distinction between the *lawful* influence of a wife and the *undue* influence of a mistress, see *Kessinger v. Kessinger*, 37 Ind. 341. For an example of husband's influence over his wife, see *Turnbull & Co v. Durbar*, 6 C.W.N. 809; Cf. *Craig v. Lamuroex*, (1920) A.C. 493. Where by frequent suggestions and insinuations of neglect and indifference on the part of the wife towards the husband, the latter's mind is very much poisoned and prejudiced against the wife, so much so that he leaves a meagre maintenance for the wife whom he loved during his life, the will would be invalid hereunder. *Govindaswami Naidu v. Kannammal*, 51 M.L.J. 747=A.I.R. 1927 Mad. 295=99 I.C. 393. Mere flattering a person into making a

favourable will is no undue influence unless misrepresentation and fraud are used. False imputation of unchastity against the testator's wife in order to poison his mind is misrepresentation and may even amount to fraud. *Mt Parbati v. Sheobali*, A.I.R. 1926 Oudh, 262-91 I.C. 159. For the undue influence of a legal adviser, see *Brajendra Nath v. Luckeymoney*, 29 Cal. 595; *Barry v. Bullen*, 2 Moo. P.C. 480; *Willis v. Barron*, (1902) A.O. 271. Cf. *Gangabai v. Bhagawandas*, 82 I.A. 142 : 29 Bom. 580; *Hindson v. Weatherill*, 6 De G. M. & G. 301; for that of a medical attendant, see *James v. Goodrich*, 5 Moo. P.C. 16; *Greville v. Tylee*, 7 Moo. P.C. 320; *Radcliffe v. Price*, 7 C.W.N. 6 (notes); for that of a spiritual guide, *Huguenin v. Basely*, 14 Ves. 273; *Lyon v. Home*, L.R. 6 Eq. 665; *Powell v. Powell*, (1900) 1 Ch. 243; *Wright v. Carter*, (1903) 1 Ch 27. Mere living of the beneficiary-daughter with the testatrix-mother, if properly explained raises no suspicion of undue influence, A.I.R. 1956 Bom. 404; Cf. A.I.R. Madh. B 246. Questions of

Cases of *Pardanashin*
Ladies.

undue influence assume an important aspect in relation to wills by *pardanashin* ladies. The following cases insisting

on independent advice and free action may be referred to in connection with the transactions of a *parda* lady, *Annada Mohan Ray v. Bhuban Mohuni*, 5 C.W.N. 489; *Shambati Koer v. Jago Bibi*, 29 I.A. 127 : 29 Cal. 749; *Nund Lal Bosa v. Nistarinee Dasee*, 30 Cal. 369; *Alikjan Bibi v. Rambaran Sahah*, 12 C.L.J. 367; *Hodges v. Delhi and London Bank*, 5 C.W.N. 1; *Moonshee Buzloor v. Shamsoonissa Begum*, 11 M.I.A. 551; *Bindubai-hini v. Gridhatri Lal*, 12 C.L.J. 115. Want of independent advice may vitiate a *pardanashin* lady's contractual transactions, but not her will. *Rambal Prasad v. Kishori Kuer*, A.I.R. 1987 Pat. 362-169 I.C. 976. Her seeking the advice of the father of her nominee is no undue influence. *Ibid.* If the *pardanashin* lady was in possession of her senses and the will was explained to her and was consistent with probabilities, that would be enough to uphold it, *Baldeo Singh v. Mt Gulab*, 13 O.L.J. 293-92 I.C. 287. For the case of a writer of the will taking benefit under it, see *Jarat Kumari v. Bissessur Dutt*, 89 Cal. 246 : 16 C.W.N. 266; *Lacho Bibi v. Gopi Narain*, 28 All 472; *Bai Gangabai v. Bhugwan das*, 30 Bom. 580 : 9 C.W.N. 769 (P.C.); *Jayram Koer v. Durga Prasad*, 36 All. 93 : 19 C.L.J. 165 (P.C.). For the case of a person taking a leading part in the procurement of a will, see *Mallappa v. Tipava*, 32 Bom. L.R. 1289 = A.I.R. 1930 Bom. 589. As to the burden and quantum of proof in such a case, *vide Ibid*; also the notes under the heading "Onus of proof" under sec. 283 *post*. When the will is made in favour of a person who was in attendance upon the testator during his last days, such person should make out that the will originated in the testator's own desire, *Cerith King v. Arthur Abreu*, 5 L.B.R. 141 : 4 I.C. 1084. Simply because the provision in the will is foolish and unnatural that will not raise a presumption of undue influence. *Mclibai Hermusjee v. Jamsetjee*, 29 C.W.N. 46 : (1924) M.W.N. 173 : 19 L.W. 497; 26 Bom. L.R. 679 : 22 A.L.J. 98 : A.I.R. 1924 P.C. 28 : 80 I.C. 777. Mere preference of one heir to another is not undue influence, *Leong Hock Waing v. Leon Ah Foon*, 7 Rang. 720 = A.I.R. 1930 Rang. 42-121 I.C. 796. Cf. A.I.R. 1956 Madh. B. 246. Mere favouritism towards a person who looked after the

testator during his last days without causing disappointment to a legitimate claimant upon his bounty will not warrant a hypothesis of undue influence, *Amir v. Mt. Jallan*, A.I.R. 1934 Lah. 628-148 I.C. 1205. The question of testamentary capacity should never be mixed up with that of undue influence, *Sayad Muhammad v. Fattah Muhammad*, 22 I.A 4 : 22 Cal. 924 (P.C.).

Proof of Fraud and Undue Influence:—There is a natural presumption of honesty in every transaction, and the proof of fraud must attain to such a degree of moral certainty as to rebut this natural presumption. Cf *Ramesh Ch. v. Rajani Kanta*, 21 Cal. 1. So, mere suspicion or the possibility that fraud has been committed is not enough, *Sheikh Imdad Ali v. Kootly Begum*, 3 M.I.A 1; *Baldeo Singh v. Mt. Gulab* 13 O.L.J. 299-92 I.C. 237. In order to make out a case of *undue influence* it is not enough to show that the testator's will was dominated by the propounder, but it is also necessary to show that the influence was exercised on the particular occasion and the will was the result of that influence, *Nabagopal Sarkar v. Saralabala Mitter*, 57 Cal. 71=A.I.R. 1933 Cal. 674=146 I.C. 414; *Sarat Chandra v. Panchanan*, A.I.R. 1953 Cal. 471. For burden of proof of undue influence, read generally, 1957 Ker. L.T. 377=A.I.R. 1957 Ker. 115. Finding of fraud without legal evidence is bad, *Damusa v. Abdul Samad*, 24 C.W.N. 61 (P.C.). Cf. *Lachho Bibi v. Gopi Narain*, 25 All. 472; *Craig v. Lamwoeux*, (1920) A.C. 349. A fraud must be proved as laid and one kind of fraud cannot be substituted for another, *Abdul Hossein v. Turner*, 11 Bom. 620.

In the case of a will of a "pardanashin lady", there is a peculiar *onus* on the propounder, *Khas Mehal v. Administrator-General*, 6 C.W.N. 605 Cf. *Kali Baksh v. Ram Gopal*, 19 C.L.J. 172; *Baldeo Singh v. Mt. Gulab*, *supra*. But if the lady is an intelligent person, the onus of proving fraud and undue influence is on the caveator, *Nabagopal Sarkar v. Saralabala*, 57 C.L.J. 71=A.I.R. 1933 Cal. 674=142 I.C. 414. In order to set aside a will on the ground of undue influence, clear evidence of such influence should be given, *Bur Singh v. Uttam Singh*, 88 Cal. 855; 13 C.L.J. 72: 15 C.W.N. 177, (P.C.) It is not enough to show that there was a motive or opportunity for the exercise of undue influence, *Ibid.* Nor is it enough to show that attending circumstances are consistent with the hypothesis of undue influence; but it must be shown that such circumstances are inconsistent with a contrary hypothesis, *Boyse v. Rossborough*, 6 H.L.C. 49. Where a will is made in favour of a person enjoying active confidence of the testatrix, the Court should scan the evidence of independent advice more closely in order to be sure that there has been a thorough understanding of the consequences by her, *Nabagopal v. Saralabala*, *Supra*.

For the burden and quantum of proof, where the will is propounded by a beneficiary taking a large interest, see *Mallappa v. Tipava*, 82 Bom. L.R. 1289=A.I.R. 1930 Bom. 539. Mere preference of one heir to another is not sufficient to

raise a presumption of undue influence, *Leong Hone Waing v. Lean Ah Fock*, 7 Rang. 720 = A.I.R. 1930 Rang. 42 = 121 I.C. 796. Where a beneficiary under a will is found to have taken a leading part in the preparation or shaping of the will the Probate Court will look upon the affair with a certain amount of suspicion, which must have to be removed before a grant can be made, *Vellaswamy Serrai v. Sivaraman Serrai*, 57 I.A. 96 = 8 Rang. 179 = 51 C.L.J. 150 = 34 C.W.N. 206 = 58 M.L.J. 114 = 32 Bom. L.R. 511 = 1930 M.W.N. 394 = A.I.R. 1930 P.C. 24 = 121 I.C. 230, P.C. When the writer of a will has taken a very active part in the preparation of the will under which he gets a substantial advantage (whether pecuniary or otherwise) the propounder of the will must prove that the testator was aware of the contents of the will, *Sarat Kumari Bibi v. Sukhi Chand*, 56 I.A. 62 = 8 Pat. 382 = 31 Bom. L.R. 270 = 1929 A.L.J. 137 = 56 M.L.J. 130 = 29 L.W. 370 = 1929 M.W.N. 149 = 38 C.W.N. 374 = A.I.R. 1929 P.C. 45 = 118 I.C. 471 (P.C.).

62. [Suc. S. 49] A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.
Will may be revoked or altered.

N. B — This section applies to Hindus &c.

Revocability of Will:—We have already seen at p. 12, ante, that the very essence of a will is that it is *ambulatory*, and is always revocable. Read *Chaitra Kumari Devi v. Mohan Bikram Shah*, A.I.R. 1931 Pat. 114 = 121 I.C. 337. As a matter of fact, this revocability is the best test whereby a will can be differentiated from a deed, *Rummons v. Ramgopal*, 12 C.W.N. 942. "The principal test as to whether the instrument is a will, is whether the disposition made takes effect during the lifetime of the executant of the deed or whether it takes effect after his death", *Sagore Chandra v. Digambar*, 14 C.W.N. 174. Cf. also *Attorney General v. Jones*, 3 Price, 368; *Sita Koer v. Deonath*, 3 C.L.J. 370 : 8 C.W.N. 614; *Rajammal v. Anthiammal*, 33 Mad. 304. It seems that a testator cannot contract himself out of this power of revoking the will; in England however such a contract against the exercise of the power of revocation, if made for good consideration, is binding and though not specifically enforceable, can sustain an action for damages, *Robinson v. Oommunney*, L.R. 28 Ch. D. 285; *Re Parkin*, (1892) 3 Oh. 510; *Jorden v. Money*, 5 H.L.C. 185; *Hammersley v. De Biel*, 12 Cl. & F. 45. In India, it has been held that if an instrument is on the face of it is of a testamentary character, the mere circumstance that the testator calls it irrevocable, does not alter its quality, *Sagore Chandra v. Digambar*, 14 C.W.N. 174. A will being revocable, no suit can be maintained for its cancellation during the lifetime of the testator, *Rambhajan v. Gur Charan*, 27 All. 14. But see *Magantal v. Gobinlal*, 15 Bom., 697. As to whether contemporaneous mutual wills by husband and wife in like terms implies an agreement not to revoke, see *Helen v.*

Perpetual Trust Co., 26 A.L.J. 1239—A.I.R. 1928 P.C. 284—111 I.O. 283 (P.C.). The revocability of a will can be made to depend on a contingency, *Re Smith*, L.R. 1 P. & D. 717. Even joint wills (see under sec. 68, post) are liable to be revoked at any time. *Hobson v. Blackburn*, 1 Addams, 278; *Re Lovegrove*, 2 Sw. & Tr. 458; See also at pp. 91-92, ante.

Revocation :—Revocation is possible at any time during the lifetime of the testator. Revocation may be partial, and then it is nothing but *alteration*. Revocation may be in express words, or may be by implication. For instance, when a subsequent will is discovered and is found to be inconsistent with the terms of a previous will, the latter is to be taken as revoked, *Saheb Mirza v. Umda Khanum*, 19 Cal. 444. Cf. *Ker v. Meakin*, 20 Bom. 370; *Re goods of Broughton*, 29 Cal. 311. Revocation during insanity is not permissible, *Borlase v. Borlase*, 4 N. & C. 106; *Brunt v. Brunt*, 3 P. & D. 37, inasmuch as competency to make a will is a condition precedent to the exercise of such power of revocation, *vide notes under sec. 59, supra*. As to mode of revocation, *vide notes under sec. 70, post*.

Onus of proof of Revocation :—The onus of proving revocation is on the party who alleges it, *Saheb Mirza v. Umda Khanum*, 19 Cal. 444. Cf. *Bayo v. Bhaura*, A.I.R. 1924 Nag. 375. As to the effect of non-production of the will, read A.I.R. 1953 Cal. 597.

CHAPTER III.

OF THE EXECUTION OF UNPRIVILEGED WILLS.

63. [Suc. S. 50] Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an air-man so employed or engaged* or a mariner at sea, shall execute his will according to the following rules :—

- (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

* Inserted by Act X of 1927.

- (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or *has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person ; and each of the witness shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.*

N. B.—This section applies to the Hindus &c. Compare this section with sec. 9 of the English Wills Act, 1837 and the Amending Wills Act, 1852.

Formalities of a Will:—This section provides the formalities that have to be observed in making an unprivileged or ordinary will, *Rammal Koch v. Hakol Kali*, 22 C.W.N. 315 : 48 I.C. 208. The formalities have been prescribed evidently with the object of preventing fraud. *Vere-Wardale In re* (1949) 2 All. E.R. 250 (P.D.A.) Certain persons, such as soldiers, in war service, by reason of their situation, are allowed to make an informal (otherwise called privileged) will. But persons in normal conditions of life are denied this privilege and the law obliges them to observe certain formalities which are mentioned in clauses (a), (b) and (c) of the section. These are—

(a) the testator must sign the will himself or through his agent or attorney or put his mark thereon. Cf. 96 I.C. 145 (Bom).

(b) The signature or the mark should appear on the will at such a place (say right hand top corner) that it may clearly show the testator's intention to give effect to it. Cf. *Sabitrī v. Savi*, 19 C.W.N. 1297.

(c) The signature of the will must be attested by two witnesses, who will also counter-sign the instrument in the presence of the testator though not of each other. In this respect the requisites for a valid will under the English Wills Act (sec. 9) differ substantially from the provisions of this section. Quite unlike the English law, this Act does not require that both the attesting witnesses are to be present at the same time, *Sabitrī v. Savi* 19 C.W.N. 1297 : 27 I.C. 748.

The formalities mean the sum-total of the formalities prescribed herein and do not mean the mere execution of the will by the testator, *Vishnu Ramkrishna v. Nathu Vittal*, 51 Bom. L.R. 245 = A.I.R. 1949 Bom. 266. If the requirements of

this section are complied with, the Court as a Court of conscience should not be deterred by mere technicalities from making a grant, *Ibid.*

Effect of Registration:—A will may be genuine although not registered. [A.I.R. 1954 S.C. 280]. Registration however helps dispel the doubt as to its genuineness, *Rani Purnima Debi v. Kumar Khagendra Narayan*, A.I.R. 1962 S.C. 567. Cf. 1959 S.C.J. 507 = A.I.R. 1959 S.C. 443. For the value of registration endorsement, read I.L.R. (1957) Panj. 418 = A.I.R. 1957 Panj. 146. Comp. *Nand Kumar v. Chander Kishore*, A.I.R. 1956 Pat. 377,

Execution of the Will:—The section says that the testator shall execute his will according to the rules prescribed in it. The use of the word shall makes compliance with the rules imperative, *Esaias v. Gabriel*, 8 N.W.P. H.C.R. 82. Execution means formal completion of the deed, *Bkawanji v. Devji Punja*, 19 Bom. 635; it includes testator's signature and the attestation by witnesses, *Syed Mahomed v. Syed Ali*, 12 O.L.J. 1 : A.I.R. 1925 Oudh, 387 : 85 I.C. 609. As to what is valid execution, see *Sabutri Thakurani v. Savi*, 19 C.W.N. 1297 ; 27 I.C. 743. A valid execution of a will is not to be taken as proved in absence of proof of the prescribed formalities, *Alomelu Ammal v. Parthasarathi Naudu*, (1938) 2 M.L.J. 95 = 1938 M.W.N. 149 = A.I.R. 1938 Mad. 326. When the document is executed by putting marks only, such marks must be affixed by the testator himself, *Radha Krishna v. Subbaraya Mudaliar*, 40 Mad. 660 : 31 M.L.J. 367 : 34 I.C. 849 : It should be noticed that this section only contemplates a will in writing, as will appear from the use of such words as "shall sign" "affix marks" "writing" and so forth. Attention is drawn to the language of sec. 66 *post*, under which a will can be made by word of mouth. For quantum of evidence to prove the execution of a will, vide notes under sec. 283, *post*, under the heading "Onus of Proof" and also read, *Ram Gopal v. Hipna Kunwar*, 49 I.A. 413 : 44 All 495 : 27 C.W.N. 485 : 21 A.L.J. 40 : 1 Pat. L.R. 273 (P.C.); *Prasannamoys v. Baikunta*, 49 Cal. 192 ; 66 I.C. 782 (on appeal 27 C.W.N., 797, P.C.); *Kalka Singh v. Jagwant Kunwar*, A.I.R. 1926 Oudh, 69. (If evidence of all the witnesses necessary); *Surendranath Chatterjee v. Jahnavi Charan*, 56 Cal. 390 = A.I.R. 1929 Cal. 484 = 119 I.C. 17. The provisions of the will being unjust to testator's wife and children do not rebut proof of execution, *Bai M nghibai v. Praggi Dayal*, 30 C.W.N. 462 = A.I.R. 1925 P.O. 198 (P.C.).

Execution on several sheets of Paper:—All the sheets need not be signed, *Sagore Mondal v. Digambar*, 10 C.L.J. 644 : 14 C.W.N. 174 ; *Lewis v. Lewis*, (1908) P. 1 ; *In re Rebecca Susan*, 2 C.W.N. cccc, and the cases cited therein.

Clause (a) : Signature of Testator:—In the first place the testator should himself sign; *Re Clark*, 2 Curt. 329 ; he should not sign by a substitute. But this section allows vicarious signing, provided the agent signs in the testator's presence and

under his direction and the testator sees him sign, *Re goods of Maddock*, 3 P. & D. 169; in the case of execution by affixing marks, such vicarious performance is not possible. So a will is not duly executed where the testator who cannot sign his name, simply touches the pen and hands it over to some one to affix his mark. He should affix the mark himself, though this section allows him to sign by proxy, *Radha Krishna v. Subbaraya*, 40 Mad. 550: 31 M.L.J. 357: 4 L.W. 255: 34 I.C. 849; *Theresa v. Francis*, 45 Bom. 989: 28 Bom. L.R. 399: 61 I.C. 587; *Re Goods of Wynne*, 19 B.L.R. 892. See, however, *Dasu Raddi v. Venkatasubbammal*, 67 Mad. 979=67 M.L.J. 721=1934 M.W.N. 185=39 L.W. 688=A.I.R. 1984 Mad. 436=152 I.C. 75, (validity of execution by marks). As to what is mark, see *Kajendra v. Jogendra*, 14 M.I.A. 67; *Barker v. Denning*, 8 A. & E. 94. The fact that a person who can sign his name makes a mark would not affect the validity of the will, *Gu'ab Khan v. Amir*, 28 Bom. L.R. 529=A.I.R. 1926 Bom 355=95 I.C. 145. If while putting the mark, the hand is guided and assisted by other agencies, that will not affect the validity of the execution, *Muktinath v. Jitendra Nath*, 22 C.L.J. 262. Cf. *Arthur Lane v. Hidayet Ullah*, (1895) A.W.N. 127; *Wilson v. Beddard*, 12 Sim. 28; *Goods of Bryce*, (1839) 3 Curt. 325; *Goods of Clarke*, 1868, 1 Sw. & Tr. 22. If a testator in making his mark is assisted by some other person and acquiesces and adopts it, it is just the same as if he made it without any assistance, *Re Amulya Kumar Bose*, 42 C.W.N. 649; also *Muktinath v. Jitendranath*, 22 C.L.J. 262=19 C.W.N. 1295, *infra*. The testator need not sign his full name, his initials may do, *Jenkins v. Gaisford*, (1863) 3 Sw & Tr. 93. *Nawab Sher Mahomed v. Deputy Commr.* 58 I.C. 134. A mere seal is not however sufficient, *Wright v. Wakeford*, 17 Ves. 454; *Smith v. Evans*, 1 Wils. 313; signature may be without pen and ink, see *Jenkins v. Gaisford*, *supra*. The impression of a *fac simile* signature (in an engraving or a rubber stamp) upon the will by the testator's servant in the presence, and by the direction, of the testator is not the making of a mark, but really signing, *Nirmal Chunder v. Saratmani*, 25 Cal. 911=2 C.W.N. 642. The signature must be made with the intention of executing the will, otherwise it will have no effect, *Re Meyer* (1908) 2 P. 363; vide also notes under clause (b), *infra*. For shaky Signature, see 27 C.W.N. 414 P.C.

Some other Person :—Such person should be some body other than the testator or the attesting witnesses, because such persons cannot be attesting witnesses. Vide notes under the heading attestation, *infra*. Also *Arabas v. Pestonji Nanabhai*, 11 Bom. H.C.R. 87. Cf. 9 Cal. 226. Such other person must sign and not put mark; but see *Barker v. Denning*, 8 A. & E. 94, and *Nirmal Chunder v. Saratmani*, 25 Cal. 911=2 C.W.N. 642, in which the word "Sign" has been given a very wide meaning.

Direction of the Testator :—To constitute a direction under this section it is not necessary that anything should be said. If a testator in making his mark is assisted by some other person and acquiesces and adopts it, it is just the same, as if he had

made it himself, *Muktinath v. Jitendranath*, 22 C.L.J. 262 : 19 C.W.N. 1295 : 27 I.C. 677, *supra*; *Re Amulya Kumar Bose*, 42 C.W.N. 649, *supra*. See also *In re Davies*, 2 Rob. Mees. Rep. 337. As to whether touching the pen and making it over is equivalent to direction, see *Krishnachar v. Vadachi*, 6 M.L.J. 209. Vide also *Radha Krishna's case* cited at p. 111, *ante*.

Clause (b) : Placing of Signature or Mark:—Strictly speaking the signature or mark may be placed at any part of the will, whether at the top, or end or in the margin. Cf. *Lemige v. Stanley*, 3 Lev. 1; *In re Robert Arthur*, 26 T.L.R. 519; *Amarendra Nath v. Kashinath*, 27 Cal. 169; *In re Porthouse*, 24 Cal. 784. The English system of executing the document at the foot does not usually obtain amongst Indians. Their custom is to execute the document at the top. Ordinarily the signature of the executant appears at the top right-hand corner, *Sabiti Thakurani v. Savi*, 19 C.W.N. 1297 : 29 I.C. 743.

Intended to give effect:—The keynote of all the formalities is that the signature or mark should be placed with the intention to give effect to the document as a will or the *animus testante*. In the absence of such intention the signature is of no effect. Cf. *Re Meyer*, (1908) 2 P. 353. For instance, where the testator signed the first few pages of a will, but left the last page unsigned with the object of deferring the completion of execution, held, that the will must be considered unsigned, *Sweetland v. Sweetland*, 4 Sw. & Tr. 6; *Burke v. Moore*, L.R. 9 Eq. 609; *Re Goods of Coombes* L.R. 1 P. & D. 302; *Re Goods of Dilkes*, L.R. 3 P. & D. 164. As to under what circumstances intention of completing execution may be inferred, see *Re Roymoney Dassee*, 1 Cal. 150; *Re Porthouse*, 24 Cal. 784; *Re Casmore*, L.R. 1 P. & D. 663. Comp. A.I.R. 1951 Kut 84.

Clause (c) : Attestation:—This section prescribes no particular mode of attestation. Cf. the provisions of sec. 59 of the T. P. Act. Attestation is something more than mere signing, A.I.R. 1956 Him. Pra 58. The term means that what is attested happened in the presence of the attesting witness. "An attesting witness is a person in whose presence the instrument is executed." The expression presence involves two ideas, namely *mental cognition* of the act and *physical contiguity*, *Suriyigur Begam v. Barodakant*, 37 Cal. 626 : 11 C.L.J. 569 ; 14 C.W.N. 974. For other cases on this subject, see *Maneckbas v. Hormasji*, 1 Bom. 547, (attestation on acknowledgment of testator); A.I.R. 1956 Andhra, 1 (attestation on acknowledgment of testator); *Raj Narain v. Abdur Rahim*, 5 C.W.N. 464; *Tofaluddi Peada v. Mohor Ali*, 26 Cal. 78; *Gill v. Gill*, (1909) P. 157; *Jones v. Jones*, 24 T.L.R. 839; A.I.R. 1956 Pat 377; *Bhaiya Girja v. Gangotri*, A.I.R. 1955 S.C. 346 [what facts the propounder has to prove]. In *Shamu Patter v. Andul*, 85 Mad. 607 : 16 C.L.J. 596, P.C. the word "attest" has been defined as "the witnessing of the actual execution of the document by the person purporting to execute it". "Witnessing" pre-supposes the faculty of seeing, and therefore a blind person

not being gifted with sight cannot attest, *Re Gibson*, 1949, 2 All. E.R. 90 (P.D.A.), but it would seem that he can attest on personal acknowledgment of the testator if he has the faculty of hearing. Attestation of the document on the strength of a personal acknowledgment of the executant is valid. Cf. *Mahomed Hassan v. Ali Haidar*, 12 O.L.J. 1-A.I.R. 1926 Oudh, 387-85 I.C. 509. Comp. Act XXVII of 1926. A personal acknowledgment may be conveyed otherwise than by express words, *Ganesham Dass v. Gulab Bi Bai*, 60 Mad. 927-53 M.L.J. 709-A.I.R. 1927 Mad. 1054-106 I.C. 150 (F.B.). The attesting witness must be able to swear both as to the act of execution and the identity of the person performing the act, *Ganga Pershad v. Ishri Pershad*, 45 Cal 748; 27 C.L.J. 548. The words "in the presence of," would include the testator being in such a position that he could, if he chose, see the witnesses (*Harendra v. Chandra Kanta*, 16 Cal. 19; *vide* 6 C.W.N. lxxv; A.I.R. 1956 Punj 145) and that it was not absolutely necessary that the testator should actually see the witnesses, because a blind person can execute a will; so it will be enough if the witnesses and the pardanshik lady (situated behind a parda) be in the same room. See *H. A. Chowdhury v. O. Lahiri*, 16 Cal. 19; *Abdul Karim v. Saleman*, 27 Cal 190; *Harmangal v. Gunaur*, 18 C.W.N. 40; *Isri Pershad v. Rai Gunga Pershad*, 14 C.W.N. 165; it is quite enough if the witness has a clear view of the testator when he signs, *Kitki v. Manager*, 7 O.L.J. 589. 58 I.C. 946; *Sher Muhammad v. Deputy Commissioner*, 7 O.L.J. 406: 66 I.C. 134. Where the testator and the attesting witnesses signed a will otherwise than in the presence of one another there is no compliance with the requirement of this section, *Mary Akhtar v. Alice Songster*, 3 Luck, 482-5 O.W.N. 259-A.I.R., 928 Oudh, 259-112 I.C. 13, *supra*. The fact of the testator and the attesting witness being in visual presence of each other should be established by positive evidence and not presumptively *Mary Akhtar v. Alice Songster*, 3 Luck, 482-5 O.W.N. 260-A.I.R. 1928 Oudh, 259-112 I.C. 13, *supra*. For attestation on acknowledgment, *vide infra*. An attestation proves no more than that the signature of an executing party has been attached to the document in the presence of a witness or that the testator admitted his signature before such witness. It does not involve the witness in any knowledge of or concurrence in the contents of the deed, nor affect him with notice of its provisions. *Nandalal v. Jagat Kishore*, 44 Cal. 186: 21 C. W. N. 225: 24 C. L. J. 487 (P. C.); *Upendranath v. Bindeshri*, 20 C.W.N. 210: 22 C.L.J. 452; *Hari Kishen v. Kashi Pershad*, 21 C.L.J. 225 (P.C.). Consequently, it cannot operate as an estoppel against the witness with respect to the facts stated in the deed, *Pandurang v. Markandeya*, 26 C.W.N. 201 (P.C.). Cf. *Msmt. Ram Kaur v. Atma Singh*, 8 Lah. 181-28 P.L.R. 355-A.I.R. 1927 Lah. 404-102 I.C. 506. If the witnesses see the testator in the act of signing, it is not necessary to see the signature or even know it to be his will or see any writing on the paper signed, *Re Moore*, (1901) P. 44; *Kitki v. Manager*, 58 I.C. 945; *Nawab Sher Mahomed v. Deputy Commr.* 58 I.C. 134; Cf. *Brown v. Skirrow*, (1902) P. 8. It is not necessary that the witnesses should see each other sign, *Sabitri Thakurani v. Savi*, 19 C.W.N. 1297: 29 I.C.

743 : see also *Muktanath v. Jitendra Nath*, 19 C.W.N. 1295 ; 22 C.L.J. 262 : 27 I.C. 677, and *Ganshamdoss v. Saraswati*, 1925 M.W.N. 286 = A.I.R. 1925 Mad. 861 = 87 I.C. 621. An unattested letter cannot constitute a will, *Richard Taylor v. Shri Krishna*, 32 Mad. 449 : 2 I.C. 4

The attesting witness must affix his signature *animo attestandi*; if the signature is put *alio intuitu*, it does not constitute the signatory an attesting witness, *Gokul Chand, Re*, I.L.R. (1944) 2 Cal. 888 = A.I.R. 1946 Cal. 168. As to who is an attesting witness, see *Nirods Mohan v. Charu Chandra*, 54 C.W.N. 455 = A.I.R. 1950 Cal. 401. As to the effect of non-production of witness, see 1967 All. L.J. 667. As to when attestation is complete, read 1955 S.O.J. 293 = A.I.R. 1956 S.C. 369 ; Comp. I.L.R. (1960) 10 Raj 1259.

As to the effect of a gift to an attesting witness, *vide* secs. 67 and 68, *post*. Persons who have signed a document in token of their consent to the disposition evidenced by a will can be held to be attesting witnesses if all the conditions laid down in the section are otherwise fulfilled, *Hiralal Narain Das v. Dharam Chaudhary*, A.I.R. 1936 Lab. 367 = 162 I.C. 393. But signature in token of acceptance of will is not *per se* equivalent to attestation, see *Nisak Ali v. Mohamed Ali Khan*, 6 O.W.N. 549 = A.I.R. 1929 Oudh, 494 = 119 I.C. 337 and *Shiam Sundar v. Jagannath*, 55 I.A. 1 = 2 Luck. 640 = 47 C.L.J. 101 = 32 C.W.N. 305 &c., cited under s.c. 67, *post*. Mere performance of the acts of attestation in a mechanical fashion does not amount to a valid attestation unless the witness puts his signature *animo attestandi*, *Re Gokul Chand*, I.L.R. (1944) 2 Cal. 888.

A scribe may be an attesting witness, *Jagannath v. Bajrang*, 48 Cal. 61 ; but the mere fact that a person is a scribe or that he put the word, "scribe" after his name will not necessarily make him an attesting witness, *Almash Chandra v. Dasarath*, 48 C.L.J. 281. Cf A.I.R. 1956 Ulin. P.R. 68 ; *Satipada v. Annakali*, A.I.R. 1953 Cal. 462 ; *Onkar Pershad v. Jagdish*, 63 P.L.R. 81. A writer of a document cannot be looked upon as an attesting witness unless he signs also as an attesting witness, *Chand Shivram v. Lettu Sakharan*, 44 Bom. 405. In order to make a scribe an attesting witness it must be shown that the signature of the scribe was put down for the purpose of attesting the document, *Jnanada Govinda v. Birendra Nath*, 69 C.L.J. 347 = A.I.R. 1939 Cal. 895 = 185 I.C. 684 ; A.I.R. 1927 Mad. 1064 (F.B.) ; I.L.R. (1955) 5 Raj 971 = A.I.R. 1957 Raj 180. If the signature is not *animo attestandi*, it is no attestation. Where an illiterate executant of a document executes it, "by the pen of" the scribe, the latter cannot be an attesting witness to the document, in as much as he cannot attest his own writing, *Sristidhar v. Rakhyakali*, 26 C.W.N. 264. The person writing or signing the testator's name is not a competent attesting witness, *Ilam Aradh v. Jamuna*, A.I.R. 1954 Pat. 360 ; *Re Hemlata Dabes*, 9 Cal. 226 ; *Nutye Gopal v. Nagendra Nath*, 11 Cal. 429 ; *Re goods of Nanabai*, 11 Bom. H.C.R. 17 ; *Radha Krishna v. Subbaraya*,

40 Mad. 550 : 31 M.L.J. 857 : 34 I.C. 849 ; *Shiam Sundar v. Thakur Jagannath Singh*, 1 O.W.N. 881 - A.I.R. 1925 Oudh, 465 - 85 I.C. 558 (affirmed by P.C. in A. I. R. 1927, P. C. 248). A person countersigning a document as a token of his express consent to its terms is not an attesting witness, *Mahomed Ali v. Nisar Ali Khan*, A.I.R. 1928 Oudh, 67 - 109 I.C. 835. So, where the sons at the request of their father put their signatures on the father's will in order to evince their consent to its terms as also to avoid all future dissensions among themselves they do not necessarily become attesting witnesses to the wills, *Shiam Sundar v. Jagannath Singh*, 55 I.A. 1 - 2 Luck. 640 - 47 C.L.J. 101 - 32 O.W.N. 805 - 26 A.L.J. 28 - 30 Bom. L.R. 110 - 54 M.L.J. 48 - (1928) M.W.N. 108 - 4 O.W.N. 1205 - A.I.R. 1927 P.C. 248 - 106 I.C. 584 (P.C.) ; 1958 Raj. L.W. 80. Notice the word "necessarily" in italics, which implies that if the other requirements of the section are fulfilled a person signing in token of his consent to the will may rank as an attesting witness, *Hiralal v. Dharam Chand*, A.I.R. 1936 Lah. 867 - 162 I.C. 389. The signature of two or more attesting witnesses to a will required by this section must be attached to the will after and not before the testator's signing or affixing his mark to it, *Bissanath v. Dayaram*, 5 Cal. 738, followed in *Re Hurro Sundari v. Chunder Kant*, 6 Cal. 17. Of. also *Fernandez v. Aloes*, 3 Bom. 382 ; *Nitye Gopal's case* 11 Cal. 429, (*supra*) ; *Brown v. Shirrow*, (1902) P. 3. The witnesses must subscribe in the presence of the testator (though not of each other, *vide* notes at p. 109, ante). In attesting, the witnesses must sign and not merely put marks. *Fernandez v. Alv.s*, 3 Bom. 382 — followed in 11 Cal. 429 (*supra*). This distinction is maintained because of the fact that the Legislature has used the expression, "Sign or mark" in relation to the testator, but in relation to the witnesses, it uses the word "sign" and not the alternative word "mark". See however sec. 3(52) of the General Clauses Act (X of 1897), which makes marking equivalent to signature in the case of illiterate persons. Remember that the definition clause of the General Clauses Act applies only in the absence of repugnancy in the subject or context. But a Full Bench decision of the Allahabad High Court has [approving the Madras decision in *Alapati Nagamma v. Alapati Venkatramayya*, 58 Mad. 220 - 68 M.L.J. 191 - A.I.R. 1935 Mad. 178 - 164 I.C. 777] held that a witness may validly attest a will by merely affixing his mark to it, *Maikoo Lal v. Santco*, 68 All. 1064 - 1936 A.L.J. 782 - A.I.R. 1936 All. 576 - 164 I.C. 298. This case has distinguished the cases of 3 Bom. 382 and 11 Cal. 429 on the ground that they were decided before the General Clauses Act, but itself overlooks the opening reservation of sec. 3 of the said Act. The Bombay Court also has held that it is not necessary that the attesting witnesses should put down their names in their handwriting and that it is sufficient if they affix their marks and thumb impressions, *Annu Bhujanga v. Ramu Bhujanga* 39 Bom. L.R. 606 - A.I.R. 1937 Bom. 389 - 171 I.C. 349. Read also *Govind Bhikari v. Bhan Gopal*, 41 Bom. 384 : A.I.R. 1959 Nag. 266 ; A.I.B. 1959 Assam, 93. All these cases overlook the context. Attestation can be by putting initials, *Ammayee v. Valumabai*, 15 Mad. 261. Of. *Re Christina*, 2 Rob. 110 ; *Margary v. Robinson*, L.R. 12 P.D. 8. A pleader signing

as an identifier on cover of a will cannot be said to have attested the will, *Umskanta Das v. Biswambhar Das*, 8 Pat. 419 = A.I.R. 1929 Pat. 401 = 17 I.C. 874. An endorsement by the sub registrar of the admission of execution may be good attestation provided the endorsement is made in the presence of the executant, 52 Mad. 123 (F.B.); 60 M.L.J. 302; *Radhamohan v. Nripendra*, 47 C.L.J. 118 (distinguished in *Abinash Chandra v. Dararath Malo*, 32 C.W.N. 1228. Cf. *Harpada v. Annada Prasad*, A.I.R. 1950 Cal. 760; *Alapati Nagamma v. Alapati Venkatramayya*, 68 Mad. 220, *supra*; *Atul Chandra v. Krishna Charan*, 67 C.L.J. 311, failing which there is no proper attestation, *Hemchandra v. Guiram*, 58 C.L.J. 545. See also *Kunwir Surendra Bahadur v. Thakur Behari Singh*, 43 C.W.N. 669, P.C.; *Bulaki Mahlon v. Dulia*, A.I.R. 1941 Pat. 368 = 193 I.C. 468.

For instances of valid attestation, see *Re Roymoney Dossee*, 1 Cal. 160; *Mir Syed Hasan v. Taiyba Begam*, 26 I.C. 547 (Oudh); *Sarada Prosad v. Triguna Charan*, 1 Pat. 300 : (1922) Pat. 401 : 70 I.C. 402. For an instance of an invalid attestation, see *Bulaki Mahlon v. Dulia*, A.I.R. 1941 Pat. 368 = 193 I.C. 468. An unattested will is invalid, *Burton v. Jackson*, 30 I.C. 263 (Oudh). For proof of attestation, see *Brahmadal v. Chaudan Bibi*, 20 C.W.N. 192 : 34 I.C. 66. Every presumption is made in favour of valid execution and attestation, *Id.*: *Nitai Chand v. Nagani*, 10 C.L.J. 499 ; 3 I.C. 426; *Sagor Mondal v. Digamlar*, 10 C.L.J. 644. A person purporting to sign as a witness may be proved not to have really signed as such, *Shiam Sundar v. Jagannath Singh*, 28 O.C. 91 = A.I.R. 1925 Oudh, 465 = 85 I.C. 558—affirmed by P.C. in 4 C.W.N. 1205 = A.I.R. 1927 P.C. 248. If an attesting witness gives wrong and/or adverse evidence, further evidence can be given to show that the attesting witness was in error, *Vera-Wardale, In re*, (1949) 2 All. E.R. 250 (P.D.A.). No question of improper attestation will arise in relation to a will, which has already been probated, *Surinder Kumar v. Gurn Chand*, 1968 S.C.J. 159 = 1958 S.C.A. 412 = A.I.R. 1957 S.C. 875.

Personnel of attesting witnesses:—An attestation is not rendered invalid or defective merely by reason of the fact that the witnesses do not hold very high position in life, *Dulhin Chandra v. Harnandan*, 20 C.W.N. 617 : 30 M.L.J. 624 : (1916) 1 M.W.N. 359 : 4 L.W. 214 : 33 I.C. 790 (P.C.). See also *Jagrani v. Kuardurga*, 36 All. 93 : 12 A.L.J. 125 : 19 C.L.J. 165 : 18 C.W.N. 521 : 22 I.C. 103 (P.C.).

Two Witnesses:—There must be two attesting witnesses under this section; but the will could be proved by one attesting witness under sec. 68 of the Evidence Act, *Rammol Koch v. Hakol Kali*, 22 C.W.N. 316 : 43 I.C. 208. If the one attesting witness called fail to prove the execution of the will, then his evidence has to be supplemented by the evidence of the other attesting witness, *Vishnu Ramkrishna v. Nathu Vithal*, 51 Bom. L.R. 245 = A.I.R. 1949 Bom. 266.

There is sufficient compliance with this section, if one witnesses the testator sign and the other witness attests on testator's acknowledgment, *Muktanath v. Jitendra Nath*, 22 C.L.J. 262 : 19 C.W.N. 1295. It is not necessary that the two witnesses should sign in each other's presence, *Sabitri Thakurani v. Sovi*, 19 C.W.N. 1297. In this respect this section differs from the English law, *Ibid.* The witness should sign after testator's signing, *vide* 5 Cal. 738, *supra*, and other cases. Where the writer of a will affixed only a mark by the pen of scribe, and there was only one attesting witness on the day of execution, but the next day the sub-registrar signed an endorsement stating that the testatrix admitted execution before him, held that the sub-registrar became an attesting witness and the will was valid, *Sarada Prasad v. Triguna Charan*, 1 Pat. 300 : (1922) Pat. 402 ; 70 I.C. 402 ; *Rajendra v. Menoka*, 1 Pat. L.R. 267. Sec. 63 (c) of the Act should be read with sec. 63 of the Evidence Act on a more scrutinising and comparative method. Section 68 of the Evidence Act requires that *at least* one of the attesting witnesses should be called in order to render a document acceptable in evidence. That does not dispense with the necessity of calling more attesting witnesses, if other purposes demand their citation. For the purposes of sec. 63 (c), it is not enough to make the will evidence in the case, which can be done simply by complying with sec. 68 of the Evidence Act. It is also necessary under this section that two valid attestations have to be proved in order to make the will operative and for this purpose literal compliance with sec. 68 of the Evidence Act may not be enough, because one witness examined under said sec. 68 may only prove his attestation, but may not be fully competent to prove that the other attestation was on the basis of an acknowledgment of the testator; and for this purpose one will have to travel beyond the requirements of sec. 68 of the Evidence Act. Read *Roda Franrose v. Kanta Vorjiwandas*, 47 Bom. L.R. 709. As to whether all witnesses are necessary to be examined, read *Kalka Singh v. Jagwant Kunwar*, A.I.R. 1926 Oudh, 69.

Sub-registrar as an attesting Witness:—As to when and where the sub-registrar's endorsement can serve the purpose of an attestation, read the following cases : 52 Mad. 123 : 60 M.L.J. 302 (F.B.); 58 Mad. 220 : read *Badhamohan v. Nripendra*, 47 C.L.J. 118 (dist in 32 C.W.N. 1228), Comp. A.I.R. 1930 Cal. 760 ; 67 C.L.J. 31. Read also *Kunwar Surendra Bahadur v. Thakur Behari Singh*, 48 C.W.N. 669, P.C. ; *Parshotam Iam v. Kesho Das*, A.I.R. 1946 Lah. 3 ; A.I.R. 1989 P.C. 117 ; A.I.R. 1953 Cal. 462 ; A.I.R. 1958 Cal. 440 ; I.L.R. (1961) Cut. 234 = A.I.R. 1961 Orissa, 180 ; 58 P.L.R. 251 ; A.I.R. 1961 Punj. 411.

Attestation on personal Acknowledgment:—See the following cases,— *Bhagwandas v. Kesnidas*, 15 Bom. L.R. 209 ; 18 I.C. 401 (followed in A.I.R. 1961 Kut. 84—in this case the will was read out to the witnesses); *Syed Mahomed Hasan v. Syed Ali*, 12 O.L.J. 1 : A.I.R. 1925 Oudh, 337 = 85 I.C. 509 ; *Bhagwan Singh v. Shiv Devi*, 35 P.L.R. 596 = A.I.R. 1934 Lah. 689 = 158 I.C. 244 ; *Manekbai v.*

Hormuji, 1 Bom. 457; *Ameer Chand v. Mahamed Bibee*, 6 C.L.J. 453; vide also at p. 118, ante. The acknowledgment is of the Signature or the mark and not of the will, *Blake v. Blake*, (1882) 7 P.D. 102; *Lewis v. Lewis*, 11 N.Y. 220. This is so because the witness attests the signature without any knowledge of the nature or contents of the document, vide notes at p. 118 ante. As to what constitutes sufficient acknowledgment, see *Blake v. Blake, supra*; *Hudson v. Parker*, 1 Rob. 14; *Inglesant v. Inglesant*, L.R. 3 P. and D. 172. A "personal acknowledgment" of execution need not necessarily be restricted to an express statement to that effect, but may include words or conduct or both, on the part of the testator which may be construed unequivocally as such an acknowledgment, *Ganshamdoss v. Gulab Bi Bai*, 50 Mad. 927 = 53 M.L.J. 709 = 26 I.W. 697 = A.I.R. 1927 Mad. 1059 = 106 I.C. 150 (F.B.). An acknowledgment after attestation is insufficient, *Re Goods of Olding*, 2 Curt. 665; *Cooper v. Beckett*, 3 Curt. 648 : 4 Moo. P.C. 419; *Hindmarsh v. Charlton*, 8 H. of L. 160; There is no acknowledgment if the signature be covered up, so that it cannot be seen by attesting witnesses, *Blake v. Blake, supra*. As the act of attestation involves certain responsibilities (Of. sec. 281, infra), the witness should be particularly cautious when attesting a will on mere acknowledgment. In the case of an attestation on acknowledgment, it is not enough to prove the attestation merely; it is also necessary to prove the acknowledgment, on the strength of which the attestation was made, *Rodu Framsoze v. Kanta Varjiwandas*, 47 Bom. L.R. 709 (cited under the last heading but one). As to whether a blind person can attest on personal acknowledgment of testator, read the notes at p. 118, ante.

Unattested Will of Oudh Talukdar :—By virtue of the provisions of sec. 19 of the Oudh Estates Act, an unattested will by a talukdar whose name has been included in the lists prepared under the Act is invalid, though at the time of the will the lists had not in fact been approved or published, *Dulalir Jadunath v. Raja Bisheshar Baksh*, 14 O. L. J. 1 = 8 O. W. N. 258 = A. I. R. 1931 P. C. 24 = 130 I.C. 306 (P.C.).

Unsigned Will :—A draft will unsigned and undated may be legally a will if it contains the last wishes of the testator, *Ram Chandra v. Dattaya*, 48 I.C. 742 (Nag.); see also *Janki v. Kallu Mal*, 3 All. 296 : 6 A.L.J. 171 : 2 I.C. 213, where it has been held that a person cannot be said to have died intestate, if he got a will drawn up to his directions and appointed a trustee therein.

Presumption of valid Execution and Attestation :—If a will does not show an attestation memo, but the signature of the testator at the foot and the subscription of two witnesses, then there arises a presumption of valid execution, *Nita Chand v. Nagani*, 10 C.L.J. 499 : 3 I.C. 426; also *Brahmadat v. Chendan Bibi*, 20 C.W.N. 192 : 34 I.C. 686. When there is a *prima facie* compliance with the formalities of law, a presumption will arise that all the acts in connection with

execution and attestation has been properly performed, *vide supra*; also *Shib Sundari v. Hemangini Debi*, 4 C.W.N. 204; *Aruna Chalam v. Ramaswami*, 30 M.L.J. 55, P.C.; *Re Goods of Phibbs*, 86 L.J. p. 81; *Vimcombe v. Butter*, 3 b.w. & Tr. 680. Where the testator was roused from unconsciousness in order to sign the will and the attestation took place immediately after his signature and the attesting witnesses were in close proximity to the testator, it can reasonably be presumed that he was sufficiently conscious and that attestation was duly taking place, *Re Amulya Kumar Bose*, 42 C.W.N. 649. If the will is otherwise in order and regular, the Court will proceed on this presumption so much so as to discard as suspicious even the testimony of witnesses who depose contrary to the tenor of their own attestation, *Mahomed Zia-ulla v. Rafi Mohammad*, 1939 O.W.N. 681 = A.I.R. 1939 Oudh, 213 = 182 I.C. 190. Read also *Vishnu Ramkrishna v. Nathu Vithal*, 51 Bom. L.R. 245 = A.I.R. 1949 Bom. 266. For the applicability of the maxim—*Omnis prae sum munitur vita essa acta* in such cases, see *Re Estate of Denning Deed*, (1968) 1 W.L.R. 462; *Sulipandu v. Annakali*, A.I.R. 1963 Cal. 463. For the application of the presumption arising from thirty years' rule of sec. 90 of the Evidence Act, read the notes at p. 272 of Madhuri Ghose's Indian Evidence Act.

Stamp:—Wills are not chargeable with any stamp duty, not being included in Sch. I of the Stamp Act (I of 1899). Cf. also Art. 33 of Sch. I of that Act, and the Government Notification dated the 24 January, 1870.

Penalty under sec. 64 of the Stamp Act:—A document which was in reality a deed of settlement was prepared and styled a will openly and without secrecy and payment of stamp was avoided on that score; these circumstances by themselves will not establish an intention to defraud the Government, so as to entail a criminal conviction under sec. 64 of the Stamp Act, *Ramchand v. Emperor*, 42 P.L.R. 215 = A.I.R. 1940. Lah. 274 = 189 I.C. 949.

Blank spaces in Wills:—Such blank spaces do not invalidate the will. *Pandurang v. Kane*, 26 Bom. 632; also 16 Bom. 652. Cf. *Re Pothouse*, 24 Cal. 784; *Cornbey v. Gibbons*, 1 Rob. 705. But evidence may not be adduced to supply the blank, see Illus. (iii) to sec. 81, post.

Writing Materials of Wills:—We have seen that the will can be extended over several sheets of paper, and that all the sheets need not be signed, *vide* note under the heading "Execution on several sheets of Paper" at p. 110, *ante*. A will can be written in ink or pencil, see *Williams*, p. 211; also *In re Adams*, 17 W.R. Notes of English cases, p. 96.

Punctuation:—When the sense of the language is clear, punctuation should be ignored; but in cases of doubtful construction or of ambiguity, it may be of some use. See *Sanford v. Rakes*, 1 Mer. 646; *Gordon v. Gordon*, L.R. 5 H.L. 254;

Huston v. Burns, (1918) A.C. 337; *Re Campbell*, (1918) I.R. 429. In case of native wills, mostly drawn up by unskilled hands, punctuation is no safe guide. Cf. *Shama Yahoo v. Dwarka Das*, 12 Bom. 202 (218).

Joint Wills:—It is competent to two persons to make a joint will, *Jithabhai Gokaldas v. Parshottam*, 45 Bom. 987 : 23 Bom. L.R. 393 : 61 I.C. 400 ; see also *Minakshi v. Viswanath*, 33 Mad. 406. Cf. *In re Raine*, 1 Sw. & Tr. 144 ; *Re Piazzi Smith*, (1898) P. 7 ; *Rajewar Misser v. Sukhdeo Misser*, A.I.R. 1947 Pat 449 [a joint will is not unknown to the law] ; read also the notes under sec. 2(h), at p. 15 *ante*. For revocation of joint wills, see *Minakshi Ammal v. Viswanath*, 33 Mad. 406 : (1910) M.W.N. 48 ; 20 N.L.T. 339 ; 5 I.C. 794 : Cf. *Re Oldham*, (1925) 1 Ch. 75. Where two persons make a joint will, and one of them dies, the survivor can revoke the will unless he had taken a benefit under it, *Heerachand v. Chandani*, 1942 M.L.R. 31 (Civ.).

64. [Suc. S. 51] If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

N. B.—This section applies to the Hindus &c.

Incorporation of papers by Reference:—This section lays down the rule how a document can be incorporated in a will or codicil and be made a part of it. If the testator, in duly attested will or codicil, refers to any other document (whether attested or not) expressing his intention, such document becomes incorporated in and forms a part of the will or codicil, *Satrupa Kunwar v. Hulas Kunwar*, 26 All. 121. The incorporated document possesses no independent testamentary efficacy of its own, but gets one by reason of its adoption, *Hocsabhai v. Yacoobhai*, 29 Bom. 267. So where the previous document is not actually adopted and formed into a part of the will, there is no such incorporation as is contemplated by this section. Cf. *Gangabai v. Bhugandas*, 32 I.A. 142 : 29 Bom. 580 : 9 C.W.N. 769. (P.C.) ; also *Hutchings v. Wood*, 2 Moo. P.O. 55 ; *Re Lewis*, 82 T.L.R. §18. The utility of the doctrine of Incorporation enunciated in this section consists in the fact that it may be exploited for the purpose of validating other testamentary or semi-testamentary documents which by reason of their inherent defects or non-compliance with the formalities of law cannot take any effect. Thus, a will which would be invalid for want of registration under the Oudh Estates Act, (sec. 18), could be saved by subsequent incorporation under this section, see *Satrupa Kunwar's case, supra*. Likewise, an invalid will (being made under undue

influence), could be validated by incorporation in a subsequent duly-attested codicil, see *Aaron v. Aaron*, 3 DeG. & S. 475. The section does not say by whom the incorporated document was written; but its language seems to suggest that the document must be the testator's document, though according to certain English cases, documents of other persons may be so incorporated, Cf. *Re Lord Howden*, 43 L.J. 26. Even a copy of a previous document may be incorporated, see *Re Mercer*, L.R. 2 P. & D. 19. But in any case, it must express his intention, and he must refer to it as expressing such intention. As to when this section will not apply, see *Manuel Louis v. Juan Coslho*, 31 Mad. 187.

Analysis of Doctrine :—The following essentials seem to be necessary :

(a) The document referred to must be in existence on the date of the will, *Goods of Sunderland*, L.R. 1 P. & D. 198; *Singleton v. Tomilson*, L.R. 8. Ap. Ca. 404 Cf. *Re Smart*, (1902) P. 298. It must be *actually written*, as the section says.

(b) The fact of the document being in existence and *actually written* must be proved.

(c) The identity of the paper must be established by evidence, *Allen v. Maddock*, 11 Moo. P.C. 427; also *Singleton's case, supra*.

(d) Reference should be clearly made so as to avoid confusion or ambiguity, see *Dillon v. Harris*, 1 A. & E. 423; *University College v. Taylor*, (1908) P. 140.

(e) Reference should be made in a will or codicil, duly attested, vide *supra*.

If the incorporated document is to be probated :—Such document need not be included in the Probate, though it is desirable to get them admitted to probate in order to prevent all future controversies. Cf. *Sheldon v. Sheldon*, 1 Rob. 81; *Re Blame*, (1897) P. 261; *Re Lansdowne*, 3 Sw. & Tr. 194; *Bizsey v. Flight*, L.R. 3 Ch. D. 269 (273).

CHAPTER IV.

OF PRIVILEGED WILLS

65. [Suc. S. 52] Any soldier being employed in an expedition or engaged in actual warfare, or an air-man so employed or engaged* or any mariner being at sea, may, if he has completed the age of eighteen years,

* Inserted by Act X of 1927.

dispose of his property by a will made *in the manner provided in section 66*. Such wills are called privileged wills.

Illustrations.

(i) A, a medical officer attached to a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will. [See *Re Estate of Colman Deed*, (1958) 1 W.L.R. 157].

(ii) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and, being at sea, can make a privileged will. [See *Re Hays*, 2 Curt. 338].

(iii) A, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.

(iv) A, a mariner of a ship, in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, for the purposes of this section, a mariner at sea, and can make a privileged will.

(v) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will. [See *Re Parker*, 2 Sw. & Tr. 375].

(vi) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will.

N. B.--This section does not apply to Hindus &c. It corresponds to sec. 11 of the English Wills Act, 1837 (1 Vict. C. 26).

Privileged wills:--Wills made in the manner laid down in sec. 66 are called privileged wills, being possible in the case of a privileged class of persons, viz. (a) A soldier, employed in an expedition or engaged in actual warfare, (b) A mariner at sea. These persons can enjoy the privilege only if they have completed the age of 18 years. The English law provides no such age qualification, see *Re Goods of Farquhar*, 4 Notes of Cases, 661; *Re Goods of Hiscock*, (1901) P. 78; *Re Goods of McMurdo*, 1 P. & D., 540.

Any Soldier:--The expression means a person in military service of the Government. So a volunteer in Government service is a soldier, *Leathers v. Greenmacer*, 53 Me. 661. An Army Surgeon in the employment of the East India Company was held to be a soldier, *Re Goods of Donaldson*, 2 Curt. 386. The privilege of this section can be enjoyed only if the soldier is employed in an expedi-

tion or engaged in actual warfare, *Estate of Grey*, (1922) P. 140; and not when in barracks, *Drummond v. Parish*, 8 Curt. 522; nor before the expedition commences, *Bowles v. Jackson*, 1 Hec. & Ad. 294; nor merely when in training, 1945 O.W.N. 816; nor when on a tour of inspection, *Re Hill*, 1 Rob. 276. For cases where privileged wills were allowed, see *Re Thorne*, 4 Sw. & Tr. 96; *Gutward v. Knce*, (1902) P. 99; *May v. May*, (1902) P. 108; *Re Hiscocks*, (1901) P. 78. In order to be entitled to make a privileged will, the soldier must have completed the age of 18 years.

Any Mariner &c. —The expression is equivalent to a seaman and includes all the people on board, *Re Saunders*, L.R. 1 P. & D. 16. Even seamen in a merchant vessel can enjoy the benefit hereof, *Re Milligan*, 2 Rob. 108; *Re Parker*, 2 Sw. & Tr. 375; also illustration (ii) above. The seaman also should be above 18 years.

Being at Sea: It means the entire voyage, and the mariner will be at sea even if the ship be for the time being in a river (*Re Patterson*, 79 L.T. 128; *Anderson v Downes*, 1916 P. 49) or lying at anchor in a port, *Hubbard v. Hubbard*, 8 N.Y. 196; Cf. *McMurdo* L.R. 1 P. & D. 540. But when the seaman is in his residence quarter on shore, he enjoys no privilege, Cf. *Barnard v. Birch*, (1919) 2 I.R. 404. An admiral who commands a naval force, but living on shore and occasionally going on board the ship is not at sea and not entitled to make a privileged will, see illustration (v) and *Euston v. Lord Hugh*, cited in 2 Curt. 888; 8 Curt. 580.

66. [See. S. 53]. (1) Privileged wills may be in writing, or may be made by word of mouth.

Mode of making, and
rules for executing
privileged wills.

(2) The execution of *privileged wills* shall be governed by the following rules:—

- (a) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.
- (b) It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.
- (c) If the instrument purporting to be a will is written wholly or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or

that he recognised it as his will.

- (d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.
- (e) If the soldier, air-man or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will.
- (f) If the soldier, airman or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.
- (g) The soldier, airman or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.
- (h) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will.

N. B —This section does not apply to Hindus &c.

Mode of Making Privileged Wills:—It may be in writing or be made by word of mouth (*nuncupative*). It may be wholly in the testator's hand and then it need not be signed or attested. [Cf. *Re Macintyre*, 41 All., 248 : 17 A.L.J. 247]. It may be wholly or partly in the handwriting of another person, and then it must be signed by the testator, though it need not be attested. When in another's hand and not signed by the testator, the will must be shown to have been written under the testator's directions or to have been accepted by him. In the case of an incomplete document, it may be valid on proof that the non-completion was not due to abandonment of the idea of making a will, but to other causes. [Cf. *Huttatt v. Huttatt*, 4 Hagg. 211]. Unexecuted instruction to prepare a will is regarded as a soldier's or mariner's will in the event of his unexpected death. Such is also the

case with respect to verbal instructions reduced to writing in his lifetime, but remaining unexecuted on account of his sudden death. Cf. *Burrows v. Burrows*, 1 Hagg. 109; *Allen v. Manning*, 2 Add 490. A will can be made verbally in the presence of two witnesses, but it will cease to be effective after one month from the date on which he loses his privilege (not being in military service &c. or not being at sea), he not dying in the meantime.

Entries in the kindred roll and in the list of names of heirs made about a soldier by the military authorities are not tantamount to the soldier's will. *Bhaghubai v. Appaji Sitaram*, 47 Bom., 552 : 25 Bom. L.R. 157 : A.I.R. 1923 Bom. 260 = 72 I.C. 277.

Nuncupative Will :—As to what is a nuncupative will, see at p. 12, *ante*. The factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one in every single particular.

Oral Will Very clear proof is also necessary of the testamentary capacity and the *animus testandi* (desire to make a testamentary disposition) in the case of such a will, *Manoiji v. Shri Ramchandra*, A.I.R. 1924 Nag. 175, *Prahlad v. Damodar*, I.L.R. (1968) Bom. 970 = A.I.R. 1968 Bom. 79; *Leminn v. Bonsall*, 1 Add. 389; *Wharram v. Wharram*, 3 Sw. & Tr. 303. In order to establish an oral will the words spoken by the testator with every circumstance of time and place should be proved with precision, *Hargovind Singh v. Collector of Etah*, I.L.R. (1937) All. 292 = 1937 A.L.J. 610 = A.I.R. 1937 All. 377 = 169 I.C. 744; *Mt. Mulia v. Amru*, 95 I.C. 18; *Ameer Hasan v. Mohammad Ejaz Husain*, 6 O.W.N. 51 = A.I.R. 1929 Oudh, 184 = 117 I.C. 456. The evidence should be such as to enable the Court to be certain about what the speaker said and the testamentary effect thereof, *Mahabir Prosad v. Syed Mustafa Husain*, 41 C.W.N. 933 = (1937) 2 M.L.J. 518 = 30 Bom. L.R. 990 = 1937 A.L.J. 1014 = A.I.R. 1937 P.C. 174 = 168 I.C. 418 (P.C.). For the use of a draft as evidence of oral will, see *Gur Prosad v. Sitala D.i.* A.I.R. 1926 Oudh, 342 = 94 I.C. 796. If the particulars of an oral will are given for the first time at the time of deposition, the Court will regard it with an amount of suspicion, *Ameer Hasan v. Mohammad Ejaz Husain*, 6 O.W.N. 51 = A.I.R. 1929 Oudh, 184 = 117 I.C. 456. In order to make a nuncupative will, the soldier need not be conscious of his privilege; all that is necessary is the *animus testandi*. *Dalrymple v. Campbell*, (1909) P. 7.

Sub-sec. (2) (a) :—**Holograph Will** : Read the notes at p. 13, *ante*. The fact that the will is a holograph one, is a strong indication that the testator was fully cognisant about what he was doing, *Santastila Dasi v. Narendra Nath Pal*, 56 Cal. 55 = A.I.R. 1929 Cal. 290 = 121 I.C. 570.

Sub-sec. (2) (b) :—Under this clause a nuncupative will ceases to be operative after the expiration of one month from the date of loss of the testator's privilege.

provided he does not die within that period. The English law is not subject to any such time limit; the will remains in force until revocation notwithstanding the loss of privilege, see *R v Bonis Scott*, (1908) P. 243; *Morrell v. Morrell*, 1 Hegg. 61.

CHAPTER V

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

67. [Suc. S. 54] A will shall not be deemed to be insufficiently

Effect of gift to attesting witness. attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband ; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Explanation —A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

N.B.—This section does not apply to the will of a Hindu &c. Therefore, a legatee under a Hindu will does not forfeit his legacy by attesting it.

Review of the Section :—This section is based on sec. 15 of the English Wills Act, 1837 (1 Vict. C. 26) and provides that the attestation of a will is not defective by reason of any benefit being given under the will to an attesting witness or to his or her wife or husband ; only the bequest fails with respect to such persons or their representatives. Cf. 1906 S. C. J. 704 = A.I.R. 1906 S.C. 747. The *Explanation* provides that a legatee under a will does not lose his legacy by attesting a codicil confirming the will. The principle underlying this *Explanation* is that each witness attests only the document to which he puts his name. *Tinkest v Tinkest*, 2 K. & J. 642; *Gurney v Gurney*, 3 Drew 208; *Gaskin v. Rogers*, L.R. 2 Eq 284. The reason of the rule of this section is not based on a consideration of the difficulty of proof of such document, but on suspicion of a possible collusion and a foul play. *Administrator-General v. Lazar Stephen*, 4 Mad. 244. Compare see 68, *infra*.

Effect of gift to attesting witness :—The Gift does not nullify the attestation, but the attestation nullifies the bequest. So if one of the two attesting witnesses receives a benefit under the will, it does not fail from want of the necessary number of attesting witnesses, *Doe v. Mills*, 1 Men. & R. 288; *Administrator-General v. Lazar*, 4 Mad. 244. Where the testator obtains signatures of the legatees as token of their consent and with a view

to avoiding dissensions among themselves the legatees do not become attesting witnesses within the meaning of this section, *Sham Sunder v. Jagannath*, 55 I.A. 1-2 Luck. 640-47 C.L.J. 101-82 O.W.N. 305-26 A.L.J. 28-30 Bom. L.R. 110-54 M.L.J. 48-4 O.W.N. 1205-A.I.R. 1927 P.C. 248-106 I.C. 584 (P.C.)—cited at p. 114, *ante*. Signature in token of acceptance of will is one thing and attestation is another thing; the former does not, while the latter does, involve the voidness of the bequest, *Nisar Ali v. Mohamed Ali Khan*, 6 O.W.N. 549-A.I.R. 1929 Oudh, 494-119 I.C. 887. Read in this connection the notes at p. 114, *ante*, under the heading, "Attestation". This section applies only when the benefit is conferred by the will ("given thereby") attested by the legatee. See the *Explanation* below and the cases thereunder. It does not apply unless the gift is *beneficial*. So where the gift is *upon trust*, it does not fail by reason of the trustee's attestation, *Re Ryder*, (1862) 2, Notes of Cases, 452. The gift must be a *directly personal* gift; so a gift to a Church is not void because a member of it was an attesting witness, *Criswell v. Creswell*, L.R. 2 Eq. 69. In case of a joint gift, if one of the donees attest the will, he forfeits his share which then goes by survivorship to the other donees, *Young v. Davies*, 2 Dr. & Sm. 207. Such is also the case as regards the gift to a class, *Fell v. Beddulph*, L.R. 10 C.P. 707. A will provided remuneration to a solicitor for the professional work to be done by him in connection with the will, but the solicitor forfeited the benefit by attesting it, *Re Barber*, 31 O.D. 665. Cf. *Re Pooley*, 40 Ch. D. 1. When a bequest fails by reason of this section, the remainder is accelerated, Cf. *Re Clark*, 31 Ch. D. 72; *Jull v. Jacobs*, 3 Ch. D. 703; *Alphin v. Stone*, (1904) 1 Ch. 543; *Re Townsends*, 34 Ch. D. 357; *Davies v. Mackintosh*, (1957) 3 All. E.R. 62; *Re Taylor*, (1957) 3 All. E.R. 56.

Husband or Wife:—The prohibition of this section extends to the husband or wife (as the case may be) of the attesting witness. These matrimonial relationships must subsist on the date of attestation, so a legatee who is neither such husband nor wife on the date of attestation, but subsequently marrying an attesting witness does not forfeit his legacy under this section, *Thorpe v. Bestwick*, 6 Q.B.D. 311. The section affects only the attesting witness, his or her wife or husband or any person claiming under either of them. So a person not so claiming is not affected hereby, see *Re Clark*, 31 Ch. D. 72. A bequest to a son of an attesting witness made independently and not as a person claiming under the attesting witness is not void inasmuch as such a case is not in the contemplation of this section, *Moore v. Turner*, A.I.R. 1937 Lah 292-174 I.C. 687.

Explanation:—The *Explanation* is based on the cases of *Gurney v. Gurney* and *Tempest v. Tempest*, cited at p. 126, *vide* notes under the heading "Review of the Section."

68. [Suc. S. 55] No person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

Witness not disqualified by interest or by being executor.

N.B.—This section applies to the wills of Hindus &c. It corresponds to secs. 16 and 17 of the English Wills Act, 1837 (1 Vict. O. 26).

A witness to a will does not lose his competency as such by reason of interest in, or of his being an executor of, a will. It may be remembered here that the writer of the will is, while the writer of the testator's name is not, a competent witness, *vide* the cases cited at pp. 118-14, ante. Also *Sham Sundar v. Thakur Jagannath*, 10 O. & A., L.R. 1261 : 1 O.W.N. 881.

69. [Suc. S. 56] Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Revocation of will by testator's marriage.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

N.B.—This section does not apply to the Hindus &c. Compare the proviso to sec. 57, ante, which expressly lays down that marriage does not revoke the will of a Hindu &c.

*Review of the Section:—(1) This section corresponds to section 18 of the English Wills Act, 1837 (1 Vict., O. 26); (ii) Every will is revoked by the marriage of the testator excepting in one case; (iii) This exception is with respect to a will made in exercise of a power of appointment, when the property over which such power is exercised, would not, but for the exercise of the power of appointment, pass to the testator's executors or to his natural heirs. The reason for this exception is this: The theory of revocation of will by marriage is based on a consideration of benefit to the new family, *vide* notes at p. 85, under "Proviso" but revocation of a will made in the exercise of a power of appointment would not operate to the benefit of the testator's family but to the benefit of those who would be entitled in default of appointment, *Re Fitzroy*, 1 Sw. & Tr. 183; *Re Fenwick*, 1 P. & D. 819; Hence this exception. Comp. (1958) 1 All E. R. 928.*

Power of Appointment:—A man is said to have a power of appointment with respect to a property, when he is invested with a power to determine the disposition of that property, though he is not the owner thereof; *vide the EXPLANATION*: For the application of the doctrine of Appointment, see the P.C. case of *Moti Vahoo v. Mamoobai*, 24 I.A. 93; 21 Bom. 709 (P.C.),—on appeal from 19 Bom. 647; *Sies-sankura v. Soobramania*, 31 Mad. 517; *Subramania v. Muregesa*, 17 C.W.N. 488, P.C. Also see sec. 92, *infra*. It is virtually the right to nominate a successor with power to transfer the estate to him, *Abdul Halim v. Saadat Ali*, 1 Luck. C. 733=A.I.R. 1928 Oudh, 155=108 I.C. 817. Such right imposes no obligation on the appointee and its conferment is something more than a privilege and amounts to a testamentary gift of power on the donee or appointee, *Ibid.* A power of appointment is either general or special. When it is general, there is no restriction on the appointment-holder to dispose of the property according to his choice. A power of appointment is special, when the appoint-holder is, by the terms of the power, obliged to make his selection from a particular class of persons or according to a particular mode or scheme of disposition. See *Hughes v. Footner*, (1921) 2 Ch. 209; *Bapuji v. Haji Esmail*, 46 Bom. 694: 28 Bom. L.R. 1259; *Abdul Halim v. Saadat Ali*, *supra*; read also the notes under sec 51, *post*. The power of appointment is subject to the law of Perpetuities, *Wollaston v. King*, L.R. 8 Eq. 165; *Stark v. Dakyns*, L.R. 10 Ch 35. For other cases, see *Javerbai v. Kahlilat*, 15 Bom. 826 (no appeal, 16 Bom. 492); *Goswami v. Madhav*, 17 Bom. 600; *Upendra Lal v. Hem Chandra*, 26 Cal 405; *Pertah Nrain v. Kuar*, 4 I.A. 228: 3 Cal. 626; *In re, Cooke Winkley v. Winterton*, (1922) 1 Ch. 292. Where a power of appointing trustees has been given to the testator's widow and daughters, upon the death of some of them the power survives to the remaining persons, *Harding v. Paterson* (1923) 1 Ch. 182. There is no inflexible and artificial rule of construction to the effect that where a power of appointment to a class is not followed by any gift, the Court is bound to imply a gift to that class in default of the exercise of the power, *Re Combe*, (1925) 1 Ch. 211. As to whether the Court can exercise the power of appointment, *Hughes v. Footner*, (1921) 2 Ch. 209.

Power to adopt conferred on a widow by the will of a Muslim Oudh talukdar

Power to adopt operating as a power of appointment.

is equivalent to a power of appointment as known under the English law; it is a valuable right, and may be lost by re-marriage, *Abdul Halim Khan v. Raja Saadat Ali*, 1 Luck. C. 733=A.I.R. 1928 Oudh, 155=108 I.C. 817.

When a power of adoption was conferred on the senior widow and she made an adoption with the object of putting pressure on the Court of Wards in possession of the estate of the deceased in order to get the claim of a junior widow as to maintenance settled, the Court held the adoption to be bogus and sham and not actually operative, *Ibid.* Where the will conferring the power to adopt on a widow provides that she will forfeit her power on re-marriage, such remarriage will bring about the desired consequence and terminate the power, *Abdul Halim Khan v. Sadat Ali Khan*, A.I.R.

1929 Oudh, 126 - 112 I.C. 596.

The law cannot compel a Hindu widow to make an adoption in conformity with her husband's direction, however strong that direction might be. Such refusal may lead to failure of the will altogether creating a state of intestacy. Upon such an event the will cannot any more be upheld as creating a trust in favour of the executors. *Varada Narayanna v. Vengu Ammal*, I.L.R. 1938 Mad. 621 - (1938) 2 M.L.J. 613 - 1938 M.W.N. 1281 - 163 I.C. 813.

Revocation of will by Marriage :—For the principle underlying this rule *vide* at p. 86, *supra* under "Proviso". In order to operate as a revocation the marriage must be a valid one. *Mette v. Mette*, 1 Sw. & Tr. 416. When the marriage is invalid, there is no revocation, *Ibid.* A will though made in contemplation of marriage is revoked by the marriage, *Re Cadywald*, 1 Sw. & Tr. 34. Cf. *Marston v. Doed Fox*, 8 A. & E. 14. As to whether marriage will operate as a revocation in respect of a testator having a domicile in a country which does not recognise the rule, *vide*, *Venugopal v. Venugopal*, (1909) P. 67. This Act being applicable to the Jews, where a Jew made a will during the lifetime of his first wife (but before his second marriage), the will was held to have been revoked on his taking a second wife, *Gabriel v. Mordakai*, 1 Cal. 148. Where a testator made a will while he was a bachelor, but subsequently married and got a son (who took no interest under the will), and the will itself could not be found after the testator's death and was therefore presumed to have been revoked, *Uttam Das v. Chanan Das*, 51 P.R. 1913 : 20 I.C. 462.

Mutual Wills :—Of two mutual wills, revocation of one by marriage does not operate as a revocation of the other. Thus, two unmarried sisters made mutual wills, one of which was revoked by marriage; the other remained unaffected, *Hinckley v. Simmons*, 4 Ves. 160. If after making mutual wills, one testator dies, it is open to the survivor to revoke his will, if he has not taken benefit under the other, *Minakshi v. Viswanath*, 33 Mad. 406 : (1910) M.W.N. 48 : 20 M.L.T. 339 : 6 I.C. 794. Cf. *Re Oldham*, (1926) 1 Ch. 76.

70. [Suc. S. 57] No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by Revocation of unprivileged will or codicil. marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

Illustrations.

(i) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation.

(ii) A has made an unprivileged will. Afterwards, A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

N. B.—This section applies to the Hindus &c. It is based on section 20 of the English Wills Act, 1897 (1 Vic. C. 26). So the Indian Law of Revocation of will is the same as in England, *Subba Reddy v. Doraisami*, 30 Mad. 369. This section is exhaustive, *Surendranath v. Sivadas*, 35 C.L.J. 488. (1929) Cal. 182. As to manner of revocation, see I.I.R. (1955) Nag. 321 = A.I.R. 1955 Nag. 126; as to proof of revocation, see 1955 S.C.J. 578 = A.I.R. 1955 S.C. 566. Cf. A.I.R. 1955, Trav.-Co. 177.

Revocation of Unprivileged Will:—This section lays down how an unprivileged will may be revoked. Such a will can be revoked (1) by marriage (except in the case of a Hindu &c.); (2) by another will or codicil; or, by some writing, declaring an intention to revoke and executed with all the formalities of an unprivileged will; (3) by burning or tearing or destroying of the will by the testator or by some one else under his direction and with intention to revoke. Of these the first mode shall not apply to the Hindus &c., see *Restriction* at pp. 88 and 89, ante. So it has been held that a Hindu will cannot be revoked except in the manner laid down in this section, subject to Restriction 4 of Sch. I:I, *Surendra v. Sivadas*, 35 C.L.J. 488: (1922) Cal. 182: 69 I.O. 567. Read the notes under the heading, "No revocation except under this section" at p. 185, post. With respect to the other two modes, it should be noticed, that they should invariably be accompanied by an intention to revoke, *Cheese v. Lovejoy*, L.R. 2 P.D. 261; *Woodruff v. Hundley*, (1900) 127 Ala. 640; *Doe v. Harris*, 6 A. & E. 209; *Williams v. Evans*, 1 E. & B. 739; *Doe v. Perkes*, 3 B. & A. 489; *Ellis v. Bartrum*, 25 Beav. 187; *Cleobury v. Beckett*, 14 Beav. 583; *Re Wilcock*, (1698) 1 Ch. 95. Vide also the notes under "Third Mode," below. A revocation of Will consists of two elements under this section, the intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animus revocandi* is not sufficient. Neither is the intention, the *animus revocandi*, sufficient unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling or obliterating are sufficient to constitute a total or partial revocation must depend upon the circumstances of each case, per *Mookerjee J. in Jelur Lal v. Dharendra*, 23 C.L.J. 314: 20 C.W.N. 504: 34 I.O. 707. Cf. *Kermode v. Macdonald*, L.R. 1 Eq. 457. But this much is clear that the destruction must be by some

method *ejusdem generis* with those described in the section, *Kharishetji v. Kekobad*, 52 Bom. 653 = 30 B.L.R. 473 = A.I.R. 1928 Bom. 194 = 109 I.C. 742. Read the notes at p. 135, *post*, under the heading, "Intention of Revoking".

Power of Revocation :—Need not be reserved, and a testator possesses such power notwithstanding any non-reservation. *Fateh Chand v. Rupchand*, 98 All. 446; 26 C.L.J. 182; 21 C.W.N. 102; 18 Bom. L.R. 900; 97 I.C. 122 (P.C.). Cf. *Aiyasami v. Appaswami*, 28 M.L.J. 542; (1914) M.W.N. 889; 26 I.C. 249.

Proof of Revocation :—The proof must be cogent and consistent, and very precise as to the time and place of revocation. *Rami Rao v. Yamunabayamma*, 12 Mys. L.J. 54 = 39 Mys. H.C.R. 658. In order to decide whether there has been a revocation or not, the Court should look to all the attendant circumstances of the case and see whether the essentials of the section have been complied with or not.

First Mode: Revocation by Marriage :—*Vide* notes under the preceding section at p. 130, *ante*, and under the "Proviso" at p. 85, *ante*. This mode is ordinarily known as revocation by operation of law as distinguished from revocation by act of parties. This mode does not apply to the will of a Hindu &c., *vide supra*, and also Restriction IV of Schedule III, at pp. 88 and 89.

Second Mode: Will; Codicil; Some Writing :—The scheme of the section is to make a distinction between these three terms. The expression "Some writing" may not be a testamentary document subject to Probate, *Re Hicks*, 1 P. & D. 684. If some writing or memorandum cancelling a will is duly executed and attested, it will operate as a revocation, though it is not a testament capable of being probated, *Re Fraser*, L.R. 2 P. & D. 40. Likewise, a letter complying with these formalities and evincing an intention to revoke, though not of a testamentary character, may come within the meaning of the expression "Some writing," *Re Durance*, L.R. 2 P. & D. 406. *Vide* also *Hord v. De Pontes*, 30 Bev. 572; *Re Gosling*, 11 P.D. 79; *Good of Eyre*, (1905) 2 Ir. R. 540. As to how a will was partly revoked by a subsequent *anumati patra*, see *Upendra v. Hem*, 25 Cal. 405. A subsequent will or codicil may operate as a revocation of a prior will only under two circumstances—(1) when there is an express clause of revocation in it, or (2) when the disposition in the later will is inconsistent with an earlier disposition. See *Kent v. Kent*, (1902) P. 108; *Sahib Mirza v. Umda Khanam*, 19 I.A. 88; 19 Cal. 444; Cf. *Re Patchell*, L.R. 3 P. & D. 163; *Cadell v. Willcocks*, (1898) P. 21 (25). The earlier will stands in so far as the terms of the subsequent will are not inconsistent with it, *Ibid.* Also *Lal Tribhuban v. Deputy Commissioner*, 47 I.C. 225; *Rai Kisori v. Debendra Nath*, 15 I.A. 87; 15 Cal. 409 (P.C.); *Almond v. De Launay*, (1918) 2 Ch. 69; *Re Churchill* (1917) 1 Ch. 206; *Re Carleton*, (1916) 2 I.R. 9; *Kedarnath v. Sarojini*, 26 Cal. 634; 3 C.W.N. 617. The mere sending of instructions to a solicitor to

draft a codicil is no proof of the revocation of the will, *Mahomed Yousus v. Abdur Sattar*, (1938) 1 M.L.J. 444 = 1938 M.W.N. 699 = A.I.R. 1938 Mad. 616 = 182 I.C. 949. In order to sustain a finding that the will has been impliedly revoked by a codicil, it is necessary to find definitely that there was a clear intention on the part of the testator, to revoke, *Gauri Parshad v. Raj Rans*, 43 P.L.R. 357 = A.I.R. 1941 Lah. 286 = 196 I.C. 177. In order that an express clause of revocation may

Actual and present intention necessary be effectual it must show an actual and present intention to revoke, see *Panakkal Ayyapan v. Elochar Chakun*, (1917) M.W.N. 645 : 41 I.C. 556 (F.B.); also *Thomas v. Evans*, 2 East 488; Cf. *Chinnappa Pillai v. Kaslasam Pillai*, 41 M.L.J. 661 : (1921) M.W.N. 812 : 14 L.W. 570 ; 39 Mad. 107 ; 32 I.C. 373 (P.C.); *Pertab Nurain v. Subhco Koer*, 9 Cal. 926 : 1 C.L.R. 113 (P.C.). A mere expression of an intention to revoke a will at some future date will not do. *Mahomed Yousus v. Abdur Sattar*, (1938) 1 M.L.J. 444 = 1938 M.W.N. 699 = A.I.R. 1938 Mad. 616 = 182 I.C. 949. In all these cases evidence as to intention to revoke must be clear, vide notes at p. 131, ante. A mere expression of belief that on the birth of a son, the law will take its own course implies no intention to revoke, *Alavandar Gramani v. Danakoti Ammal*, A.I.R. 1927 Mad. 388 = 99 I.C. 775. "Another will" seems to include a nuncupative will provided it is proved as required by law. From this an oral revocation of a written and registered will seems to be possible, subject to this limitation that the oral revocation itself taking effect as an oral will, must be established by the same standard of proof as is necessary for a nuncupative will, *Alavandar Gramani v. Danakoti Ammal*, A.I.R. 1927 Mad. 388 = 99 I.C. 775.

Codicil not revoked Codicil is not revoked merely by the revocation of the will, by revocation of will. unless it appears that in revoking the will the testator intended thereby to revoke the codicil as well, *Surendranath v. Sivadas Mookerjee*, 35 C.L.J. 488 : (1922) Cal. 182 : 69 I.C. 167 ; *Narayan v. Devi Das*, 112 P.W.R. 1916 : 41 P.L.R. 1917 : 35 I.C. 899. The conduct of the sons cannot be evidence of intention of the testator in the matter of revocation of a will though his own declaration might be admissible, *Ibid*; also *Re Goods of Blackley*, (1883) 6 P.D. 169. Where a testator bequeathed the residue of his estate upon trust for certain charities and by a subsequent codicil bequeathed that residue to another person absolutely, there was revocation, *In re Stoodley*, *Hooson v. Stoodley*, (1916) 1 Ch. 242.

Presumption as to Revocation. Where a testator makes a registered will and gives it to another person for custody but calls for the will shortly before his death, and keeps it with him, and it is not forthcoming on his death, the presumption is that the will has been destroyed, *Aditram v. Bapulal*, 45 Bom. 906 : 23 Bom. L.R. 276 : 61 I.C. 455. Cf. *Padman v. Hinwanta*, 19 C.W.N. 929 : 22 C.L.J. 172 : 98 P.R. 1915 : 18 A.L.J. 801 : 29 I.C. 807 (P.C.); A.I.R. 1953 Cal. 657 ; *Sohan Bibi v. Hiram Bibi*, 10 I.C. 280 (All.); *Sarat Chandra v. Golap Sundari*, 18 C.W.N. 527 : 21 I.C. 121. The presumption is however rebuttable, *Harilal Chatterjee v. Sarat Chandra*, 43 C.W.N. 824. As

to from what conduct on the part of the testator revocation may be inferred, read *Lakshmi Nirasammi v. Ammanni Siddharts*, 71 M.L.J. 845 = 1936 M.W.N. 902 = A.I.R. 1937 Mad. 26 = 168 I.C. 247 [Revocation not inferred from testator's long silence over or forgetfulness about the will]. For presumption arising from loss of will, see *Hawanta v. Padman*, 160 P.W.R. 1909 : 245 P.L.R. 1913 : 4 I.C. 1164; *Welch v. Phillips*, 1 Moo. P.C. 299; *Uttam Das v. Chanan Das*, 51 P.R. 1913 : 283 P.L.R. 1913 : 20 I.C. 462; *Deputy Commissioner v. Tejkishen*, 14 O.O. 14 : 8 I.C. 695; *Anwar Hossein v. Secretary of State*, 31 Cal. 885; read also the notes at p. 136, post. As to revocation by marriage, see at p. 130, ante.

Third Mode : Burning : Tearing : Destroying :—No hard and fast rule can be laid down as to how far burning &c. should go. But this seems to be clear that to constitute burning, it is not necessary to consume the *entire* document, *Doe v. Harris*, 6 A. & E. 209; it will be enough if the *entirety* of the will is destroyed by burning or tearing, Cf. *Holbs v. Knight* 1 Curt. 768; *Re Lewis*, 1 Sw. & Tr. 31; *Re Morton*, 11 P.D. 141. So tearing off the last signature alone will effect a revocation, *Re Harris*, 3 Sw. & Tr. 485; *Re Gullan*, 1 Sw. & Tr. 29; Cf. *Elms v. Elms*, 1 Sw. & Tr. 155. Cutting is equivalent to tearing, *Clarke v. Scripps*, 2 Rob. 568; By tearing in this section is not meant a literal tearing to pieces; the slight act of tearing *with intent to revoke the whole will thereby*, is sufficient for the purpose, *Johur Lall v. Dhirendra Nath*, 23 C.L.J. 814 : 20 C.W.N. 304 : 34 I.C. 707. *Re Cowling v. Cowling*, (1924) P. 113. A will may be revoked by parol and where definite authority is given by the testator to destroy the will with the intention of revoking it, that is in law sufficient revocation although the instrument is not in fact destroyed. There must be very cogent evidence to prove the *animus revocandi*, *Bayo v. Bhaura*, 1924 Nag. 376. (Cf. *Subba Bhatta v. Sree Singers*, 1 Mys. L.J. 116). As regards other modes of destruction, such methods as erasing, cancelling or obliterating may be employed. Cf. *Re Brewster*, 29 L.J.P. and M. 69. As to what acts constitute or do not constitute destruction, see the following cases, *Stephens v. Taprell*, (1840) 2 Curt 458; *Leonard v. Leonard*, (1902) P. 243; *Re Horsford*, L.R. 3 P. & D. 211; *Elms v. Elms*, (1853) 1 Sw. & Tr. 155; *Clarke v. Scripps*, (1852) 2 Rob. 563; *Miran Baksh v. Mahir Behi*, 6 P.W.R. 1916 : 41 P. L. R. 1916 : 31 I.C. 693. Mere cancellation of the will by drawing lines across it will not be enough if no *animus revocandi* (an intention to revoke) is not made out, *Kharselji v. Kekobad*, 62 Bom. 663 = 90 Bom. L.R. 473 = A.I.R. 1928 Bom. 194 = 109 I.C. 742. In this Bombay case, the testatrix destroyed the outer cover of the will and drew two crossed lines in ink on the first page thereof and wrote at its top the words, "the will is cancelled" but otherwise the will was left intact and the Court held that there was no effectual revocation.

By some other Person :—Vide notes at p. 131, *supra*, may be done by some other person, but as the law requires the testator to show an *animus revocandi*, these acts must be performed *in his presence and by his direction*, with the intention of

revoking. So the revocatory acts cannot be performed in the testator's absence, *Ol. Stockwell v. Ritherden*, 1 Rob. 661. An unauthorised revocatory act done by an agent, cannot be ratified by the testator, *Gill v. Gill*, (1909) P. 157; *Mills v. Millward*, L.R. 15 P.D. 20.

Intention of Revoking:—*Vide* notes at pp. 131 & 132, *supra*, under "Revocation of Unprivileged Will". An actual and present intention and not an intention *in futuro* is necessary, read the notes at p. 132, *ante*.

No Revocation except under this Section:—This section does not recognise any other mode of revocation excepting those already mentioned, so there is no revocation by birth or adoption of a child, *Subba Reddy v. Dorassami*, 30 Mad. 369 : 25 M.L.J. 363 : 21 I.C. 78; *Bodi v. Venkatasam*, 38 Mad. 389 ; Cf. *Mir Syed Hasan v. Tatyabi Begam*, 1 O.L.J. 691 : 26 I.C. 457 ; 12 Mad. 490 ; 14 Mad. 172 ; 16 Mad. 400. In point of fact the law does not recognise any revocation by implication. *Kaikhushra Jehangir v. Bachu Bas*, 3 D.L.R. (Bom.) 26 : I.L.R. (1955) Cut. 126 = A.I.R. 1956 Orissa, 151. A transfer *inter vivos* of a portion of the devised property does not revoke the will, but simply renders it ineffectual with respect to the said portion, *Ford v. De Pontes*, 30 Beav. 572 ; *Asanud v. Roshni Bibi*. 2 Lah. L.J. 178 ; *Thakur Singh v. Arya Pratinidhi Sabha, Punjab*, 29 P. L. R. 534 = A.I.R. 1928 Lab. 934 = 110 I.C. 700. As to the circumstances that will not lead to an inference of revocation, *vide Lakshmi Narasamma v. Ammannu Seddhants*, 71 M.L.J. 845 = 1956 M.W.N. 902 = A.I.R. 1957 Mad. 26 = 168 I.C. 247 [twenty years' survival after will and remarriage of the testator did not raise any inference of revocation].

Revocation under a mistaken notion of fact:—When a testator revokes a will on an erroneous conception of a fact, the revocation is inoperative if the mistake is patent, *Campbell v. French*, 3 Ves. 321 ; because law assumes that revocation was intended only in the event the mistaken fact was true, and when that contingency failed, there was no intention to revoke, see *Attorney-General v. Ward*, 3 Ves. Jur. 327 ; *Skipwith v. Cabell*, 19 Gratt. 758.

Doctrine of Dependent Relative Revocation:—Where the act of destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend on the efficacy of the new disposition intended to be substituted such will be the legal effect of the transaction and therefore if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also and the original will remains in force (*Goods of Middleton*, 10 Jur. N.S. 1109); see Henderson's *Suc.* 4th Ed. p. 101. Thus, if by his will a testator gives property to A and by a codicil gives the same property to B, and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced

altogether or that it should be displaced only in favour of B and, if B cannot take, the gift to A should remain, or in other words the Revocation is *relative* and dependent on the taking effect of another devise; this is called the doctrine of Dependent Relative Revocation, see *Dickinson v. Swatman*, 30 L.J.P. & M. 84; *Goods of Eccles*, 2 Sw. & Tr. 600; *Dance v. Crable*, (1879) L.R. 3 P. & D. 98; *Re Fleetwood*, 16 Ch. D. 694; *Murray v. Murray*, (1906) 2 All. E.R. 359. The application of the doctrine of dependent relative revocation is a question of intention, *Vencalanarayana Pillai v. Subbrammal*, 43 I.A. 20: 39 Mad. 107: 23 C.L.J. 366: 20 C.W.N. 234: 3 L.W. 177: 14 A.L.J. 178: (1916) 1 M.W.N. 97: 18 Bom. L.R. 372: 29 M.L.J. 851: 32 I.C. 373 (P.C.) [affirming 4 I.C. 1046] and citing *Tupper v. Tupper*, (1866) 1 K & J 665; *Quinn v. Butler*, (1868) L.R. 6 Eq 225; *Baker v. Story*, 23 W.R. (Eng.), 147; *Alexander v. Kirkpatrick*, (1874) L.R. 2 H.L.Sc. Div. 397.

Loss of Will: -If a will which was known to be with the testator is found to be missing or destroyed after his death, a natural presumption will arise that he revoked it. *Drake v. Sykes*, 22 T.L.R. 741: 11 C.W.N. xlviii (48); *Welch v. Phillips*, 1 Moo P.C. 299; *Brown v. Brown*, 8 E. & B. 882; *Santu v. Masku*, 1940 A.I.R. 96 = A.I.R. 1940 All. 175 = 187 I.C. 747; *Harihar Chatterjee v. Saratchanara*, 43 C.W.N. 824, and other cases at p. 184, ante. In India, wills are not taken great care of; therefore, such presumption here is not so strong as elsewhere, *Sahuri Licsad v. Collector of Meerut*, 29 All. 82. Also 3 Sw. & Tr. 449; 1 P. & l. 371. Loss of will does not always raise a presumption of revocation, *Feroze Din v. Mula Singh*, 26 Punj. L.R. 244: 85 I.C. 542; see also *Srinivasa Iyengar v. Torunarayana*, 44 Mys. H.C.R. 57 = 18 Mys. L.J. 17; *Prafulla Roy v. Purnendu*, 2 D.R. 99; *Ram v. Munshi Ram*, 52 P.L.R. 411 = A.I.R. 1960 E.P. 368.

71. [Sue. S. 58] No obliteration, interlineation or other alteration made in any unprivileged will after the effect of obliteration, interlineation or alteration in unprivileged will so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will:

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

N.B.—The section applies to Hindus &c. It is based on sec. 21 of the English Wills Act. Though the wording of the English Statute is a little different from

that of the present section, there is no substantial difference between the two acts.

Obliteration:—Obliteration is a mode of alteration; the use of word "or" suggests this. Obliteration is effective only when it is so complete, that it cannot be made out what the words originally were. Cf. *Re Greenwood*, (1892) P 7; *Re Harris*, 1 Sw. & Tr. 536; or in other words, when it renders the words or meaning of the will illegible or undiscernable. *Townley v. Watson*, 3 Curt. 761 (769); *Re Ibstock*, 2 Curt. 337. There is no difference between the different modes of obliteration, *Re Horsford*, L.R. 3 P. & D. 211 (in this case the obliteration was by pasting a piece of paper on the will). Where the obliterated words can be deciphered by magnifying glasses, or by an expert in handwriting (without the use of chemicals) or by removal of some pasted paper, such obliteration does not operate as a revocation. *Re Gilbert*, (1893) P. 183; *Cooper v. Beckett*, 4 Moo. P.C. 419; *Re Horsford*, *supra*. *Re Ibstock*, *supra*. Obliterations &c. are not effective without the *animus revocandi*. *Townley's case*, *supra*; *vide* also notes at p. 191, ante.

Alterations: Interlineations:—It should be noticed that the section refers to obliterations, alterations &c. after execution, and not before, *Re L.P.D. Broughton*, 29 Cal. 311. Cf. *Re Streatly*, (1891) P. 172. The alterations must be executed with the formalities of a will, *Re Treby*, L.R. 3 P. & D. 242. Evidence must be given of the time when the alteration was made, *Re Hindmarch*, L.R. 1 P. & D. 107; mere unattested initialling of an alteration would not do, *Re Cunningham*, 29 L.J.P. & M. 71; Cf. *Re De Well*, 17 Jur. 1180. See the *Prviso*; unattested alteration before the Registrar is of no effect, *Malhusamier v. Sreesrao*, 38 Mad. 856 : 25 M.L.J. 393 : 19 I.C. 694; *Raghubar v. Ram Rakhan*, 1 C.W.N. 428; Cf. *Surendra v. Ranees Dass*, 47 Cal. 1043 : 24 C.W.N. 860. The principle of Dependent Relative Revocation applies to obliterations, interlineations, alterations, *Re McCole*, 3 P. & D. 94; *Brooke v. Kent*, 3 Moo. P.C. 341; *Re Horsford*, *supra*; *Ker v. Meakin*, 20 Bom. 370; *Re Greenwood*, (1892) P. 7; *Re Blewett*, 3 P.D. 116. For other cases, see *Pandurang v. Vinayak*, 16 Bom. 652; 26 Bom. 632; *Nagendra Nath v. P. N. Banerji*, 21 P.R. 1913 : 19 I.C. 692; *Re White*, 4 Cal. 582. Alterations not executed with the formalities of a will are not operative, *Raghubar Dyal v. Ram Rakhan*, 1 C.W.N. 428. An alteration made without the knowledge of the testator is of no effect except that it bars the claim of the person who makes the alteration, *Paramma v. Ram Chandra*, 7 Mad. 302; see also *Re Bay*, (1904) 1 Ch. 317; *Raghubar v. Ram Rakhan*, *supra*. Cf. *Re Jessop*, (1924) P. 221.

Distinction between alteration and interlineations:—Alterations effect a change, whereas interlineations supply a gap, or complete an otherwise incomplete sentence, *Re Oudge*, *infra*. For unattested interlineations, see *Re Jessop*, (1924) P. 221.

Presumptions as to alterations &c.:—In the absence of direct evidence as to when the alterations &c. were made, there is a presumption that they were made after the execution of the will, *Cooper v. Beckett*, 4 Moo. P. C. 419; *Pandurang's case*, *supra*; *Re James*, 1 Sw. & Tr. 288. The presumption will not be rebutted by the mere fact that the alteration bears a date earlier than that of execution and is in the testator's handwriting, *Re Adamson*, L.R. 3 P. & D. 259. Cf. *Surendra v. Runee Dasi*, 47 Cal. 1043 : 24 C.W.N. 890. Alterations &c. made in a will which would be incomplete without them must be presumed to have been made before execution, *Re Cadge*, 1 P. & D. 543; *Re Birt*, 2 P. & D. 214; Alteration in ink before execution is presumed to be final, *Gann v. Gregory*, 2 D.M. & G. 760. As to alteration in pencil, see *Hawkes v. Hawkes*, 1 Hagg. 321.

Blank Spaces:—*Vide* notes at p. 119, *ante*: also *Re King*, 23 W.R. (Eng.) 552; *Kerr v. Skinner*, (1904), 1 Ch. 317.

Proviso:—An alteration or interlineation will be deemed to be duly executed (1) if it is signed by the testator and two witnesses in the margin, or (2) so signed by them somewhere opposite the alteration or interlineation, or (3) if there be a memorandum at the foot of the will so signed by them and if the memorandum clearly refers to the alterations or interlineations; see in this connection, *Re Shearn*, 50 L.J.P. 15; *Re Blewett*, 49 L.J.P. 31.

72. [Suc. S. 59] A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or Revocation of privileged will or codicil by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to be revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

This section does not apply to Hindus &c.; see Sch. III, but the original sec. 59 (which is re-enacted here) applied to Hindus &c. It lays down how a privileged will can be revoked. It can be revoked by (1) an unprivileged will or codicil, (2) by evincing an *animus revocandi* followed by an overt act (with the formalities of a privileged will), though the person does not for the time being possess the qualification which entitles him to make a privileged will—*Explanation*, or (3) by tearing, burning &c., by himself or an authorised agent in his presence with an intention to

revoke. It is also revocable by marriage, see sec. 69, *supra*, which applies to "every will".

73. [Suc. S. 60] (1) No unprivileged will or codicil, nor any part thereof, which *has been* revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required and showing an intention to revive the same.

(2) When any will or codicil, which *has been* partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as *has been* revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil.

N.B.—This section applies to Hindus &c ; see Sch. III. It is based on sec 22 of the English Wills Act, 1837 (1 Vic. C. 26).

Revival of Unprivileged Will:—If an unprivileged will is revoked, it can be revived only (a) by re-execution of the will, or (2) by a formally executed codicil, an intention to revoke being present in either case. Sub-sec. (2) further says that when a will is first partially revoked and then wholly revoked, the revival under sub-sec. (1) will not have the effect of restoring the part lost by first revocation, unless an intention to that effect is evident in the re-executed will or codicil. See *McLeod v. Mc Nib.* (1891) A.C. 471. If a revoked will is revived by a new will or a codicil, with new attesting witnesses, the old witnesses cease to be witnesses and can therefore take under the revived will, *Anderson v. Anderson*, L.R. 13 Eq. 81. The effect of confirming a will by a codicil is to bring the will down to the date of the codicil, *Goonewardene v. Goonewardene*, 61 M.L.J. 840 = 84 L.W. 964 = A.I.R. 1931 P.O. 807 = 134 I.C. 1074 (P.C.). This section contemplates revocation in any manner. So the question is whether a will revoked by physical destruction can be revived under this section, the English authorities seem inclined to answer this question in the negative, see *Rogers v. Godenough*, 2 Sw. & Tr. 342; *Newton v. Newton*, 12 Ir. Ch. Rep. 118; *Hale v. Tokelove*, 2 Rob. 318; *Re Reade*, (1902) P. 76. We have no decided case on this point in this country, but it is difficult to take this narrow view (though more sensible) in the face of the broad expression "in any manner". It certainly includes revocation by marriage, *Re Chapman*, 1 Rob 1; *Payne v. Trapier*, 1 Rob. 683; *Re De Silva*, 2 Sw. & Tr. 316.

Intention to revive:—There cannot be any revival under this section unless there is an express intention in that behalf, *Skinner v. Orde*, (1846), 1 Rob. Ecc. 868; *Re Steele*, 1 P. & D. 575; *Walpole v. Lord Oxford*, 3 Ves. 402. Cf. 1 Mori.

Dig. 390. It should be noticed that in both the sub-sections intention to revive must be shown by the re-executed will or the codicil. So parol evidence is not admissible to prove such an intention. *Major v. Williams*, 3 Curt. 482; *Walpole v. Cholomondely*, 7 T.R. 138, s.c. *Walpole v. Lord Oxford, supra*.

Re-execution :—The prefix 're' indicates, that the fresh execution of the will is to be attended with all the formalities prescribed in sec. 63, *supra*. Cf. *Dunn v. Dunn*, 1 P. & D. 227; *Bell v. Fothergell*, 1 P. & D. 148.

Revival v. Republication :—The former means *restoring* a revoked will, the latter means *confirming* an unrevoked will so as to make it operate as if executed on the date of republication. Republication brings the will to date, *Dale v. Dale*, (1909) W. N. 59; *Greasy v. Sampson*, (1917) 1 Ir. R. 186; *Rs Hardyman*, (1925) 1 Ch. 287.

No revival except as hereunder :—As there is no revocation by implication, (*vide* notes at p. 135, *ante*), so there is no implied revival, *Re Steele*, L.R. 1 P. & D. 575; *Marsh v. Marsh*, 1 Sw & Tr. 522. In fact the Legislature has not contemplated any other mode of revival than those laid down in the section. Cf. *Re Hodykinson*, (1893) P. 339; *Re Reade*, (1902) P. 75.

CHAPTER VI

OF THE CONSTRUCTION OF WILLS.

74. [Suc. S. 61] It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom.

The section applies to Hindus &c.

The Rule :—No technical word or expression is necessary in order to write out a will. All that is necessary is that the intention of the testator should clearly appear from the language. Thus, where a will consisted of three words "all for mother" it was held to be a valid will, *Thom v. Dickens*, (1906) W.N. 54. Cf. *Mary Hariat v. George*, 31 Mad. 283. *Din Tarini v. Krishna Gopal* 36 Cal. 149: 18 C.W.N. 291. No terms of art need be used in a will so long as they are sufficient to express the intention of the testator. *Ali Raza Khan v. Nawazish Ali*, 1943 O.W.N. 50 = A.I.R. 1943 Oudh, 243 = 206 I.C. 7. Any recital in a will indicative of an intention to give will imply that a gift has been made but no recital which

simply represents an impression but not an intention to give, will be construed as a bequest by implication, *Niladri Nath Mukherji v. Satish Ch. Mukherji*, 88 C.W.N. 604 = A.I.R. 1934 Cal. 668 = 162 I.C. 886. Thus, if a person recites in his will that he has given a legacy to a certain person, that will be evidence of his intention to give and may eventually take effect as an actual devise. But if the recital is that a certain person has an interest in the property independently of the will, that will be no evidence of an intention to give and will therefore not take effect as a bequest, *Satish Chandra Mukherji v. Niladri Nath Mukherji*, 89 C.W.N. 237 = A.I.R. 1935 Cal. 788 = 160 I.C. 124—on appeal from 88 C.W.N. 604, *supra*. For the principles governing construction of wills, see *Jiban Krishna Das v. Jitendra Nath Das*, 53 C.W.N. (F.R.) 29 = 1949 F.L.J. 103 = (1949) 1 M.L.J. 625 (F.O.), 61 Bom. L.R. 443 = 1949 A.L.J. 226 = A.I.R. 1949 F.C. 64. Cf. A.I.R. 1958 Mad. 431 : A.I.R. 1957 Punj. 146.

General Rules regarding Construction of Wills:—The whole scheme of the Law of Wills is to respect the wishes of a deceased person to govern his estate from the grave; therefore, where there is no uncertainty about the testator's intention as expressed in his will that intention should be carried into effect, *Satyabhama Bai v. Murlidhar*, I.L.R. (1944) Nag. 817 = A.I.R. 1944 Nag. 377. That is why a testamentary Court always interests itself in ascertaining the intention of the testator in relation to his estate and proceeds to do so by gathering such intention directly from the last testament of the deceased, if that is possible, and if that is not possible, by applying certain artificial rules of construction prescribed in Part VI, Ch. VI of this Act. So it has been observed that in construing a will, primarily, effect should be given to the testator's intention disclosed by the unambiguous language occurring in the will. The plain and the natural meaning of such language should not be departed from to give effect to a supposed intention of the testator on the assumption that he used it in a particular sense and not in a sense consonant with the personal law, *Natwar v. Mt. Lei*, A.I.R. 1930 All 652—relying on, A.I.R. 1917 P.C. 23 (P.C.). The Judicial Committee have also observed that the duty of the Court is to ascertain the intention from the words used in the instrument, aided, if necessary, by consideration of the surrounding circumstances. Due allowance should be made for the fact that the Indian wills are mostly inartistic and expressed in loose and inaccurate language and that the environment of an Indian, his manners, habits, mental outlook are quite different from those of an English man. The best thing that a Court can do in such circumstances is to put itself into the testator's arm-chair and give effect to his intentions, *Rajendra Prosad v. Gopal Prasad Sen*, 67 I.A. 296 = 10 Pat. 167 = 52 C.L.J. 287 = 84 C.W.N. 1161 = 59 M.L.J. 615 = 1931 M.W.N. 169 = 7 O.W.N. 1062 = 92 Bom. L.R. 1588 = 1930 A.L.J. 1184 = A.I.R. 1930 P.C. 242 = 127 I.C. 749 (P.C.). The Court should always give effect to the plain meaning of the words used in the will, *Kistammal v. Saraswati Bai*, (1938) 2 M.L.J. 1010 = 1938 M.W.N. 1152 = A.I.R. 1939 Mad. 112 = 179 I.C. 749, and should not allow the clear and unambiguous dispositive

words to be controlled or qualified by any general expression of intention, *Golak Behari v. Suradhani*, I.L.R. (1939) 1 Cal. 63 = 68 C.L.J. 246 = A.I.R. 1939 Cal. 226 = 181 I.C. 705.

In construing wills care should be taken to see that the construction placed upon one portion of the will is not repugnant to the clear intention appearing in another part, *Manikam Pillai v. Venkatesu Chetty*, A.I.R. 1627 Mad. 494 = 99 I.C. 705. Read also *Kestammal v. Saraswati Basu*, 19 38 M.W.N. 1152 = (1938) 2 M.L.J. 1010 = A.I.R. 1939 Mad. 112 = 179 I.C. 749, *supra*. For the rule of construction to be placed on the divergent, inconsistent and irreconcilable clauses, e.g. where after creating an absolute interest, pious directions are enjoined in restraint of the absolute power, *vide Mokshada Ranjan v. Swendra Bijoy*, 68 C.L.J. 22 = A.I.R. 1939 Cal. 40 and the other cases, under sec. 95, *post*. Read also *Venkataramayya v. Pitchamma*, A.I.R. 1925 Mad. 164. If the particulars of the property subsequently enumerated in a will are not exhaustive of every thing included in the earlier general description, it should not limit the meaning of the earlier, comprehensive and generic description of the subject-matter, *Elizabeth May v. Bhupendra Nath Basu*, 7 Pat. 520 = A.I.R. 1928 Pat. 304 = 111 I.C. 57.

Language of Will:—Where the language of the will is clear and consistent, it must receive its literal construction unless there is something in the will itself to suggest a departure from it, *Gurusam v. S. Ammal*, 22 I.A. 119 : 18 Mad. 347 (P.C.). There are two cardinal principles in the construction of wills, viz. (1) clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention; (2) technical words must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words, are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense, *Lalit Mohan v. Chukun Lal*, 24 Cal. 884 : 1 C.W.N. 387 (P.C.); *Gurudas Roy Choudhury v. Bhupendra Nath*, 43 C.W.N. 141; see also *Ramchandra v. Benabai*, 20 Bom. 571; *Re Simco*, (1913) 1 Ch 662; in order to ascertain the meaning to be applied to a particular phrase, it is necessary first to consider the words of the will, and next the surrounding circumstances which may affect the testator's meaning, *Dharapala v. Ananta*, (1913) M.W.N. 822 : 24 M.L.J. 418 : 13 M.L.T. 305 : 18 I.C. 973, *Bhuggalbatty v. Gomoo Irosongo*, 26 Cal. 112. Cf. *Hamilton v. Ritchie*, 1894 A.O. 810 (3:3); *Rajendra Prasad v. Gopal Prasad*, 57 I.A. 296 = 52 C.L.J. 287 = 34 C.W.N. 1161 = 10 Pat. 187 = &c. (P.C.)—cited under the last heading. Where the language is clear and unequivocal the construction cannot be altered for the purpose of escaping from what may occur to be the harsh consequences of rules of law, *Suresh Chandra v. Lalit Mohan*, 20 C.W.N. 463 : 22 C.L.J. 316; *Annie Wilson v. G. Oakes*, 31 Mad. 283. See *Soorjee-money v. Deno Bundhu*, 6 M.I.A. 526 (550); *Tagore v. Tagore*, 9 B.L.R. 577 : 18 W.R. 359 (P.C.). When the language used by the testator has well expressed his

intentions, the Court should not speculate about his supposed intention, *Natwar v. Mt. Lai*, A.I.R. 1930 All. 652, cited above. As to when the subsequent terms in a will, will not be allowed to cut down the express terms thereof, see *Fcol Cooverbai v. Raisahab Keshri Singh*, 45 M.L.J. 249-25 Bom. L.R. 621-A.I.R. 1923 P.C. 112-73 I.C. 242, P.C. Cf. A.I.R. 1964 All. 716. In construing a will the Court must look to all the clauses of the will and give effect to all, ignoring none as redundant, or contradictory, *Shib Lekshan v. Tarangmi*, 8 C.L.J. 20. Cf. *Leach v. Jay*, 6 Ch. D. 42; *Queen v. Commission*, 22 Q.B. 506; the meaning of the testator is to be ascertained by the words, he made use of, *Pankisto v. Bamasondery*, 9 W.B. (P.C.) 1; *Burlow v. Orde*, 5 B.L.R. 1 : 13 W.B. (P.C.) 41 : 13 M.L.A. 277; *Narain Das v. Tek Chand*, 1923 Sind. 42; *Ernest v. Gray*, 48 M.L.J. 707 : (1926) M.W.N. 123 : A.I.R. 1926 Mad. 599; *Bissonath v. Bamasondery*, 12 M.L.A. 41; *Anandrao v. Administrator-General*, 20 Bom. 465; *Lowther v. Benunc*, (1874) L.R. 19 Eq 166; *Administrator-General v. Hughes*, 40 Cal. 192 : 21 I.C. 183; *Ralph v. Carrick*, (1874) 11 Ch. D. 878; *Piramu Ammal v. Serunath*, 86 I.C. 737.

Construction of terms. Primary meaning of words is the starting point of construction, *Jehangir v. Kaikhosru*, 39 Bom. 29; *Ram Lal Mookherji v. Secretary of State*, 7 Cal. 304. The ordinary and grammatical sense of words used in a will must be adhered to unless such adherence would lead to some absurdity or repugnance, *Kunkanya Bux v. Ram Dei Kuer*, 1944 O.W.N. 88-A.I.R. 1944 Oudh, 162. Technical terms of English law are to be understood in their technical sense, *Kistimoney Doshee v. Narendra Krishna*, 16 I.A. 29 : 16 Cal. 383. Cf. 37 Mad. 199 (P.C.) : 79 I.C. 1026; *Dinbai v. Nussewanji*, 49 Cal. 1005 : 27 C.W.N. 199 : 37 C.L.J. 420 : 46 M.L.J. 572 ; 26 Bom. L.R. 625 : 69 I.C. 923 (P.C.). It will serve no useful purpose in attempting to construe the words of one will with reference to those in another will, *Prabha Kuverba v. Kasumbabas*, I.L.R. (1940) Bom. 761-42 Bom. L.R. 827-A.I.R. 1940 Bom. 382-192 I.C. 431; *Tulsidas v. Advocate General of Bombay*, 39 Bom. L.R. 495-A.I.R. 1937 Bom. 447-171 I.O. 742; *Nanderam Tahsilam v. Molisam Pessumal*, 22 S.L.R. 285-A.I.R. 1927 Sind, 234-109 I.C. 843; *Nisar Ali v. Muhammad Alikhan*, 6 O.W.N. 549-A.I.R. 1929 Oudh, 494-119 I.C. 337. In matters of construction of wills, decisions in other cases cannot afford sufficient guidance, *Provabati Debya v. Sorajen Devi*, 33 C.W.N. 1015. For the principles of construction of will, read generally 1958 S.C.J. 420-A.I.R. 1963 S.C. 304; A.I.R. 1964 Mad. 19; also A.I.R. 1966 Assam, 81.

As to how to ascertain whether the terms used refer to a *persona designata*, or to a person of certain status or position, read 1968 S.C.R. 214-A.I.R. 1967 S.C. 816. Cf. A.I.R. 1958 Andhra, 447. The rules for the interpretation of will not being the same as those for the interpretation of statutes (Vide notes at p. 2, ante), one need not make any fetish as to whether the terms of the will are artistic or not, provided such terms though not of art do not stand in the way of ascertaining the intention of the testator, *Ali Raza Khan v. Nawazish Ali*, 19 Luck. 109-

1943 O.W.N. 50 = A.I.R. 1943 Oudh, 243 = 206 I.C. 7. A Madras decision has said that where the will gives some lands out of total lands to the legatee, the legatee would have the choice of selecting the lands, *Bala Krishna v. Mahalakshmi*, A.I.R. 1956 Mad. 621.

Construction of Mafusil Vernacular Wills:—In construing vernacular wills drawn up and executed in the Mafusil, the Court should take care not to apply wholesale the principles of construction which are applicable to the wills executed in the Presidency towns and drawn up by Solicitors and Advocates. [*Manikan Pillai v. Venkatesa Chetty*, A.I.R. 1927 Mad. 494 = 99 I.C. 705]. Outside Calcutta, the art of drafting wills is little understood; and Mafusil wills are mostly of a simple and inartificial character, *Bipradas Goswami v. Sadhan Chandra*, 66 Cal. 790 = A.I.R. 1929 Cal. 801. Cf. *Kannamma v. Machamma*, 1927 M.W.N. 909 = A.I.R. 1928 Mad. 297 = 107 I.C. 497.

Method of Construction where drafting was done without legal aid: Where the draft of a will was prepared without any professional aid, undue stress should not be laid on words or expression which might have particular significance if they had been used by a lawyer, *Thakurji Maharnj v. Raji Indra Prasad*, 1940 O.W.N. 1303 = A.I.R. 1941 Oudh, 105 = 192 I.C. 89; *Rajendra Prasad Bose v. Gopal Prasad Sen*, 57 I.A. 296 = 10 Pat. 187 = 52 C.L.J. 287 = 34 C.W.N. 161 = &c. (P.C.) cited under the heading, "General Rules regarding construction of wills" at p. 141. It may incidentally be pointed out that a draft will may be accepted as evidence of an oral will where the facts show that the testator had expressed his final intention as to the disposition of his property, *Gur Prasad v. Sita Devi*, A.I.R. 1926 Oudh, 342 = 94 I.C. 796.

Rules formulated for Construction of English documents or rigid rules of English Language to be avoided:—Wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, though executed in the English language and character must not be interpreted by the application to them of a too rigid construction of the English language. *Indira Rani v. Akhoy Kumar*, 59 I.A. 419 = 56 C.J.J. 423 = 37 C.W.N. 163 = 9 O.W.N. 1113 = 1932 M.W.N. 1301 = 64 M.L.J. 46 = A.I.R. 1932 P.C. 269 = 140 I.C. 433 (P.C.). This principle will apply with greater force, when the Court has got to proceed on the basis of an English translation of a vernacular document, *Nisa Ali Khan v. Mahomed Ali Khan*, 59 I.A. 263 = 7 Luck 324 = 9 O.W.N. 614 = 66 C.L.J. 36 = 36 C.W.N. 937 = 34 Bom. L.R. 1299 = 63 M.L.J. 336 = A.I.R. 1932 P.C. 172 = 187 I.C. 589 (P.C.).

Where a vernacular will has to be construed due allowance may be made for shades of meaning not susceptible of exact translation; but where the will is in English, no such consideration arises and it has to be construed keeping in view the dicta of the Judicial Committee in the above-mentioned cases, see

Pramathanath Sarkar v. Suprakash Ghose, 58 Cal. 77 = A.I.R. 1932 Cal. 337 = 182 I.C. 904. When an Indian will is couched in the English language and the Indian Judges have construed some of its ordinary words in a special sense or in an inaccurate sense, the Judicial Committee will be reluctant in over-ruling them, *Rajeshwari Kuer v. Khuthna Kuer*, 48 C.W.N. 78 = (1948) 2 M.L.J. 169 = A.I.R. 1948 P.C. 121 = 209 I.C. 408 (P.C.). Cf. (1968) 2 W.L.R. 327 [Scottish will written in English].

Succession limited to direct lineal heirs:—Where succession is limited to "direct lineal heirs", such heirs will include both male and female heirs unless a particular sex is excluded expressly or by necessary implication or inheritance by heirs of that sex is not possible under the law, *Mir Sofdar Ali v. Mirza Maksud Ali*, 34 C.W.N. 209, P.C.; see *Bhimnath Missir v. Tara Das*, 49 C.L.J. 594 = 33 C.W.N. 897 = 57 M.L.J. 580 = 30 L.W. 75 = 1929 M.W.N. 639 = A.I.R. 1929 P.C. 162 = 116 I.C. 608, P.C.

Reference to Hindu notions and wishes in construing Hindu Wills:—In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, *Krishnadas Tulsidas v. Dwarkadas Kaliandas*, 38 Bom. L.R. 829 = A.I.R. 1236 Bom. 459.

Bengali terms:—They are to be construed as they are understood by Bengali Lawyers, *Harris v. Brown*, 28 Cal. 621: The following Bengali words have received particular construction.

"Malik":—The word imports a bequest of heritable and alienable estate, *Udhoram v. Mehr*, 114 P.R. 1916; *Lala Ramjevan v. Dal Koer*, 24 Cal. 406; *Ram Lall v. Secretary of State*, 7 Cal. 304. Cf. 28 Cal. 670 (P.C.); *Sudhamani v. Surat Lal*, 28 C.W.N. 541 : 38 C.L.J. 253 : 45 M.L.J. 247 : A.I.R. 1923 P.C. 65; *Golak Behari v. Suradhani*, I.L.R. (1989) 1 Cal. 69 = 68 C.L.J. 246 = A.I.R. 1988 Cal. 226 = 181 I.C. 706; *Bijai Bahadur v. Mathura*, A.I.R. 1922 Oudh, 278 : 68 I.C. 555; *Bhaidas v. Bai Gulab*, 35 C.L.J. 314 : 26 C.W.N. 129 (P.C.); *Msmt. Sasimani v. Shub Narayan*, 26 C.W.N. 425 (P.C.); *Rajnarain v. Ashutosh*, 27 Cal 44; *Shub Lakshan v. Tarangini*, 8 C.L.J. 20. The effect of the word "malik" is to confer on the donee a heritable and alienable estate, especially when a power of alienation has been conferred in express terms; and there will be no difference in the position whether the legatee is a male being or a female one, *Parshottam Das v. Shivram*, 42 P.L.R. 209 = A.I.R. 1940 Lab. 287 = 189 I.C. 546; *Ram Saran v. Ganga Devi*, 9 Lab. L.J. 32 = A.I.R. 1927 Lab 898 = 109 I.C. 830: but the context may qualify or cut down the full proprietary rights that the word "malik" *prima facie* imports, *Sulochana v. Jagattarini*, 30 C.L.J. 51. Vide also the cases cited in this case at p. 54, of the report; *Nand Kishore v. Pasupathi Nath*, 7 Pat. 396 = A.I.R. 1928

Pat. 348 = 108 I.O. 328. Making the legatee owner of the property, after the death of the testator, amounts to conferring an absolute estate on him, *Farkash v. Chandar Parkash*, 33 P.L.R. 35 = A.I.R. 1932 Lah. 215 = 198 I.C. 365. Read also *Shirdayal v. Rimeshwar*, A.I.R. 1927 Nag. 358 = 99 I.C. 626. The word "Malik" was understood in a restricted sense (Cf. sec. 83, post) in *Punchoomoney v. Mohiney*, 10 Cal. 342; also in 24 Cal. 406, *supra*. Cf. *Rajnarain v. A. Chuckerbury*, 27 Cal. 44; *Rajnarain v. Kallayani*, 4 C.W.N. 338; *Padam Lal v. Tek Singh*, 29 All. 217; *Thakur Prosid v. Jumma Kunwar*, 31 All. 308. It was construed to mean a life estate in *Chukkun Lal v. Lalit Mohan*, 20 Cal. 906; 24 Cal. 834. Notwithstanding the use of the word "malik" the interest created may be a life-estate, if the power of alienation be restricted and if there be ulterior disposition, *Ram Rakht v. Peoples' Bank of Northern India Ltd.* A.I.R. 1942 Lah. 42 = 199 I.C. 677. For the meaning of the expression "malik like myself," see *Amarendra v. Suradhani*, 14 C.W.N. 458 : 5 I.C. 73. For the meaning of *Nirbyudha malik*, see *Suresh Chandia v. Lalit Mohan*, 22 C.L.J. 316 : 20 C.W.N. 463 : 81 I.C. 405. For *milkyat* and *malik-o-quabiz*, see *Hateh Chand v. Rup Chand*, 48 I.A. 189 = 38 All. 446 : 26 C.L.J. 182 (P.U.); *Msmt Ram Kaur v. Atma Singh*, 8 Lah. 181 = 28 P.L.R. 355 = A.I.R. 1927 Lah. 404 = 103 I.C. 506. Absence of the word "malik" in a will, will not necessarily imply that only a life-estate has been created, *Mohan Singh v. Mt. Gur Devi*, A.I.R. 1931 Lah. 728 = 131 I.C. 738. In order to preclude the creation of an absolute interest by the use of the word "malik" a contrary intention must be expressed in clear unambiguous terms, *Golak Behari v. Suradhani Dasi*, I.L.R. (1939) 1 Cal. 68 = 68 C.L.J. 246 = A.I.R. 1939 Cal. 226 = 181 I.C. 705.

"Putra Poutradikrame":— Vide the following cases: *Srinath Rai v. Pratap Udai*, 28 C.W.N. 145 (P.C.); *Ram Narain v. Ram Saran*, 23 C.W.N. 866 (P.C.); also 42 Cal. 305; *Ram Lal v. Secretary of State*, 7 Cal. 304, P.C.; *Bhujanga v. Ramayama*, 7 Mad. 387; *Mir Safer Ali v. Mirza Maksud Ali*, 34 C.W.N. 208, P.C. cited at p. 145, ante. The words *putra poutradikrame* are merely descriptive of the estate conferred and do not import a gift over to the sons and grandsons of the legatee, *Jagadish Chandra v. Rai Pade Dhal*, A.I.R. 1941 Pat. 458 = 196 I.C. 66. That is, it implies that a general estate of inheritance is given and not an estate to one person with a gift over to sons and grandsons, *Sardha Presad v. Debendra Nath*, 21 Pat. L.J. 37 = A.I.R. 1940 Pat. 257 = 186 I.C. 172. The expression *putra poutradikrame* is a term of art to confer an absolute interest, *Bipradas Goswami v. Sadhan Chandra*, 66 Cal. 790 = A.I.R. 1929 Cal. 801.

"Poutradikrame":—This word is rarely used in Bengali documents to indicate a succession in male line, *Bipradas Goswami v. Sadhan Chandra*, 66 Cal. 790 = A.I.R. 1929 Cal. 801.

Uttaradhibkari : Waris :—Means an heir, who comes into existence on the death of the ancestor, *Guru Das Roy v. Bhupendra Nath*, 48 C.W.N. 141.

Non-Bengali Words :—The use of the words, "malik kamil" in relation to a manager 'muntazimkar' of a will to whom no interest has been given will not make him an owner of the property, absolute or limited, *Thakurji Mahraj v. Raj Indra Prasad*, 1940 O.W.N. 1803 = A.I.R. 1941 Oudh, 105 = 192 I.C. 86. Where in one portion of a will, the testator used the expression "Aulad narina" and in another portion the word "aulad," alone, the word *aulad* is to be taken to mean both male and female issue, and this is also the ordinary meaning of the term. *Bhaiya Ajudhia Baksh v. Muna Kuar*, A.I.R. 1926 Oudh, 467 = 95 I.C. 786. The word "imlek" means property, and comes of the same root as "malik," *Jagdeo Singh v. Deputy Commissioner, Partabgarh*, 2 Luck, 507 = 13 O.L.J. 762 = A.I.R. 1926 Oudh, 481 = 96 I.C. 47. As to the meaning of Telugu words, "Kelingina" and "Santaram", see *Kunnamma v. Machammi*, 1927 M.W.N. 909 = A.I.R. 1928 Mad. 297 = 107 I.C. 497. "Karta" in Telugu wills means an heir, *Venkata Krishnayya v. Vasreddi Madamma*, A.I.R. 1928 Mad. 926 = 112 I.C. 225. The use of the word "malik" may not often lead to the creation of an absolute estate, but serve to give rise to a life-estate only, *Swami Dayal v. Ramadhar*, 8 O.W.N. 566 = A.I.R. 1931 Oudh, 358 = 134 I.C. 865. Cf. *Abadi Begam v. Mahomed Khalil Khan*, 6 Luck, 282 = 7 O.W.N. 1010 = A.I.R. 1930 Oudh, 481 = 132 I.C. 768. "Naslan bad naslan" means generation after generation, *Ibid.* A bequest to wife and daughter making them *mak kawil* (full owners) without any concern with any of the relatives gives them a full and unqualified estate, *Shivdayal v. Rameshwar* A.I.R. 1927 Nag 958 = 99 I.C. 626. The expression "Aan santhatbi" means male issue and not male descendants, *Cruz v. Nagiah Nadu*, 55 M.L.J. 683. As to the meaning of the terms, "riyaset", "waris" and "janashin," see *Jagdeo Singh v. Deputy Commissioner, Partabgarh*, 2 Luck, 507 = A.I.R. 1926 Oudh, 481 = 97 I.C. 47. The expression, "Kabzawa Tararuff Malikana" means possession and enjoyment as an owner, *Mahomed Ali Khan v. Nisar Ali Khan*, 1 Luck. C. 592 = A.I.R. 1928 Oudh, 67 = 109 I.C. 895.

Money :—*Vide, Administrator-General v. White*, 13 Mad. 379; *Re Mann*, (1912) 1 Ch. 388; *Re Skillen Charles*, (1916) 1 Ch. 518; *Paroona v. Gharib Das*, 5 A.L.J. 708. The word "money" is a more comprehensive term than "cash". It is a term of elastic connotation and will receive a wider or more restricted construction according to the context in which it occurs and in the light of the intention of the testator, *Sarat Chandra v. Charusila Dasi*, 55 Cal. 918 = A.I.R. 1928 Cal. 794. The context of a testament may enlarge the meaning of money to any point between ready cash and the whole of the personal estate of the testator, including securities and investments etc., *Taylor v. Tweedi*, (1923) 1 Ch. 78, C.A.

Devise of "Widow's Estate" :—The trend of Judicial decisions is that a widow's estate can be devised, A.I.R. 1956 Pat. 467; A.I.R. 1958 S.C. 304; *Nakul Chandra v. Khudabux*, 66 C.W.N. 149. This view however does not seem to be correct; read 6 Leg. Misc. 94. The incorrect judicial opinion should not be attempted to be followed on the basis of *stare decisis*, because the *stare decisis* here has been on a

wrong basis, read Progressive Law.

75. [Suc. S. 62] For the purpose of determining questions as

Inquiries to determine
questions as to object
or subject of will.
to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations.

(i) A, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grandchild or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(ii) A, by his will, leaves to B "my estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(iii) A, by his will, leaves to B "the estate which I purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

N B—This section applies to Hindus &c.; but in applying to them, the words, son, child &c. are to be taken to include an adopted son, child or &c., see Sub. III, Restriction No. 5; also at p. 89 *ante*.

Inquiry as to Object or Subject-matter:—This section authorises the Court to hold enquiries in order to determine as to what *person* (i.e. the object of the will) or what *property* (i.e. the subject-matter of the will) is denoted by the words used in the will and may enquire into every *material fact* relating to the *person* or the *property*, or the *circumstances* of the testator or of his family, or any other fact necessary to determine the exact meaning of the testator, *Garth v. Meyrick*, 1 Bro. C.C. 30; *Re Brabes*, 6 P. & D. 217; *Re Taylor*, 34 C.D. 265. Cf. *Re Harrison*, (1894) 1 Ch 551. The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language he uses, *Charter v. Charter*, L.R. 7 E. & I. Ap. 364 (377); *Whitefield v. Longdate*, L.R. 1 Ch. D. 61. In short, as the Judicial Committee have observed, the Court is entitled to put itself into the testator's arm-chair, *Rajendra Picad v. Gopal Prosud Sen*,

57 I.A. 296 = 10 Pat 187 = 52 C.L.J. 287 = 34 C.W.N. 1161 = 59 M.L.J. 615 = 1931 M.W.N. 189 = 7 O.W.N. 1062 = 32 Bom. L.R. 1588 = 1930 A.L.J. 1184 = A.I.R. 1930 P.C. 242 = 127 I.C. 743 (P.C.). Every testator is in an environment with reference to which he acts, but which he seldom describes fully in his will, and sometimes alludes to but slightly, *vide Tarachurn's case, infra*. *Bhagbati v. Bholanath Thakoor*, 2 I.A. 256. As to the Court's power to enquire into the surrounding circumstances, see *Soorjeemoney v. Denobundho*, 6 M.I.A. 256; Cf. *Tarachurn v. Suresh*, 16 I.A. 166 : 17 Cal. 122; *Faiz M. Khan v. M. S. Khan*, 26 I.A. 77 : 26 Cal. 816; *Bissonath v. Bamasoondery*, 12 M.I.A. 41. "The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and family and others whom he names and describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances," *Hiscocks v. Hiscocks*, 9 L.J. Ex. 27. On the same point, see also the following cases, *Pryor v. Petre*, (1894) 2 Ch. 11; *Kulsambi v. Khensabi*, 18 L.W. 667 (P.C.). *Venkataramasimha v. Poonthasarathy*, 41 I.A. 61 : 37 Mad. 199; *Bhuggobutty v. Gooroo Prosunno*, 26 Cal. 112; *Sher Bahadur v. Ganga Bakh*, 41 I.A. 1 : 35 All. 101; *Dhanapala v. Anantha*, 24 M.I.J. 418 : 19 I.C. 973; *Hart v. Hart*, 18 Ch. D. 670; *Crooke v. Hill*, L.R. 6 Ch. 911.

The power of controlling the disposition of property from the grave is a great privilege and in order to give effect to it, it is necessary to know exactly in favour of which ascertained or ascertainable persons (or objects) the disposition has been made, *Attorney-General of Newzealand v. Newzealand Insurance Co. Ltd.*, 41 O.W.N. 321 = (1937) 1 M.I.J. 58 = 1937 M.W.N. 196 = A.I.R. 1937 P.C. 8 = 166 I.C. 833 (P.C.). It may be incidentally pointed out here that a valid dedication of property by will to the family idol can be made, *Cherag Ali Sarkar v. Khajeh Habibullah*, 53 C.L.J. 421 = A.I.R. 1931 Cal. 782 = 184 I.C. 311.

Evidence for such Enquiry:—Extrinsic evidence is admissible to enable the Court to ascertain the object or the subject-matter of the will, *Stringer v. Gardiner*, 27 Beav. 37; the effect of such evidence is not to add to or vary what the testator has said, but to ascertain his meaning, *Higgins v. Dawson*, (1902) A.C. 2; *Re Grainger*, (1900) 2 Ch. 756; *Re Glassington*, (1906) 2 Ch. 305; Parol evidence of intention is admissible only to determine what person or thing was referred to by the testator, see *Indar Kunwar v. Jatpal Kunwar*, 15 I.A. 127 : 15 Cal. 725; Cf. *Bayabai v. Haridas*, 40 Bom. 1 : 17 Bom. L.R. 115 ; 27 I.C. 946; *Pannakkal Ayyappan v. Eluchar*, (1917) M.W.N. 645 : 41 I.C. 556. (F.B.). The meaning of the testator should be ascertained from the words he has used, of course, in the light of the surrounding circumstances, *Frankisto v. Bamasoondery*, 12 M.I.A. 41. Cf. *Shamsul Huda v. Sebakram*, 2 I.A. 7 : 14 B.L.R. 226; *Abbot v. Middleton*, 7 H.L.C. 68 (114); *Salochana v. Jagallarini*, 80 C.L.J. 51 (55). But where words are clear, evidence of extraneous facts is inadmissible, *Pestonji v. Framji*, 12 Bom.

L.R. 863 : 8 I.C. 180 ; compare *Lakshimbai v. Ganpat*, 4 B.H.C.R. 150 : 5 B.H.C.R. 128 ; *Gangabai v. Thavar*, 1 B.H.C. 71 ; consideration of improbability may help in arriving at a right consideration as to the facts meant by the testator, *Kulsambi v. Khensabai*, 18 L.W. 667, (P.C.) ; Parol evidence is admissible only to render the

Parol Evidence

meaning of the testator intelligible, *Glassington's case, supra* :

Re Raynor, (1904) 1 Ch. 187 ; or to clear up an uncertainty or an ambiguity, *Pestonji's case, supra*. In the case of a word of an accepted meaning, evidence may not be adduced to show that the testator used it in a different sense, *Millard v. Bailey*, L.R. 1 Eq. 378. Thus, evidence cannot be given to show that the testator meant by the term, "second cousin" the children of first cousin, *Bentham v. Wilson*, 17 Ch. D. 262. In a gift to "my nephews and nieces," the fact that the testator had none of his own is relevant to show that he referred to those through his wife, *Sherroll v. Mountford*, L.R. 8 Ch. 928. Evidence was admitted to show that the testator meant by the word "children" his wife's children, *Re Deakin Starkey v. Eyres* (1894) 3 Ch. 665, vide also *Dre v. Allen*, 12 A. & E. 451. Likewise, evidence is admissible to show what property is referred to in the will, *Whitfield v. Longdale*, 1 Ch. D. 61. Or in other words, evidence is admissible to show what property answers the description given in the will, *Castle v. Fox*, L.R. 11 Eq. 542 ; evidence may be adduced to show that the testator was in the habit of calling particular persons or properties by particular names, *Lee v. Pain*, 4 Hars. 251 ; *Wehler v. Corbett*, L.R. 16 Eq. 515 ; or to show that he called a man by a nick-name, *Beaumont v. Fell*, 2 P. Wm. 141 ; see also *Price v. Page*, 4 Ves. 660. Evidence of statements made at the time of the execution of a will cannot be admitted for the purpose of varying its terms, *Govind v. Chintaman*, A.I.R. 1928 Nag. 55 = 105 I.C. 840.

Corporations as legatees :—Corporations may be beneficiaries under a will just as they can be executors of a will [vide notes under the heading, "Corporations" under sec. 222, post]. A charitable and legal institution mainly for lawful objects, but including within its scope objectionable matters such as making exuberant and fiery speeches cannot be regarded as having been incorporated for unlawful objects so as to be incompetent to take under a will, *Universal Negro Improvement Association v. Ann Rebecca Morter*, A.I.R. 1928 P.C. 119 = 115 I.C. 737 (P.C.).

Idols as legatees :—See *Cherag Ali Sarkar v. Khajeh Habibullah*, 53 C.L.J. 421 = A.I.R. 1931 Cal. 782 = 194 I.C. 311, at p. 149, ante. As to whether a gift is to the idol subject to a charge in favour of the heirs or it is to the heirs subject to a charge for the expenses of the idol, see *Krishnaswami Sastrigal v. Avayambal Ammal*, A.I.R. 1933 Mad. 204 = 142 I.C. 721.

Trustees as Legatees :—When a bequest is made in favour of a trustee for the benefit of some religious or charitable objects, the trustee virtually becomes the legatee, and he holds the property for the benefit of the named object. The trustee

of a religious or charitable trust has no power to make any alienation of the trust property except when such alienation becomes necessary in the interests of the trust. Any alienation which is not justified by real necessity or by reasonably accredited necessity for the purposes of the trust, is void, and in the case of public trusts, religious or charitable, even the trustee who alienates can bring a suit for the recovery of the property and he is not personally estopped from doing so, sec. 64 of the Trusts Act, not applying to the case, *Sivaswami Aiyar v. Thirumedi Chettiar*, 57 M.L.J. 219 = A.I.R. 1930 Mad. 405 = 118 I.C. 499.

76. [Suc. S. 63] Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

(2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(i) A bequeaths a legacy to "Thomas, the second son of my brother John." The testator has an only brother named John, who has no son named Thomas, but has a second son whose name is William. William will have the legacy. [See *Stockdale v. Bushby*, 19 Ves. 381, *Mostyn v. Mostyn*, 17 Beav. 323.]

(ii) A bequeaths a legacy "to Thomas, the second son of my brother John." The testator has an only brother, named John, whose first son is named Thomas, and whose second son is named William. Thomas will have the legacy. [See *Newbolt v. Price*, 14 Sim. 954; *Gillet v. Gane*, L.R. 10 Eq. 29; *Re Munn's Trusts*, L.R. 19 Eq. 331.]

(iii) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate. [See *Standen v. Standen*, 2 Ves 589.]

(iv) The testator gives his residuary estate to be divided among "my seven children" and, proceeding to enumerate them, mentions six names only. This omission will not prevent the seventh child from taking a share with the others.

(v) The testator, having six grandchildren, makes a bequest to "my six grandchildren" and, proceeding to mention them by their Christian names, mentions one twice over omitting another altogether. The one whose name is not mentioned will take a share with the others. See *Garth v. Meyrick*, 1 Bro. C.C. 33.

(vi) The testator bequeaths "1,000 rupees to each of the three children of A." At the date of the will A has four children. Each of these four children will, if he survives the testator, receive a legacy of 1,000 rupees.

N. B—This section applies to Hindus &c.; but in applying to them the words, son, child &c. are to be taken to include an adopted son, child &c., see Sch. III, Restriction No. 5; also at p. 89, *ante*.

Misnomer or Misdescription of Object:—When the words used in a will to designate or describe a legatee or a class of legatees clearly show who or what is meant, an error in the name or description shall not render the legacy inoperative. This mistake as to name may be corrected by the *description* and the error in the description by *name*. The illustrations appended to the section will make the point clear. Thus, a gift was made to Clare Hannah, the wife of A. A's wife was named

Hannah only, and his daughter was named Clare Hannah, Description by Relationship.
who was infant. The name being rectified by the description,

the Court allowed the gift to the wife, *Adam v. Jones*, 9 Hare 485. Likewise a bequest was made to F for life, and after his death to his wife Letita; Letita was not a married wife of F; nevertheless the bequest to Letita took effect, *Anderson v. Berkley*, (1902) 1 Ch. 936; Compare illus (iii). Again a property was bequeathed to one S. and on his death to his adopted son K; but K being S's daughter's son, could not be legally adopted; the gift to K nevertheless took effect, *Murari Lal v. Kundan Lal*, 31 All. 339; *Lalta Piccad v. Salig Ram*, 31 All. 5; *Lili v. Murlidhar*, 28 All. 488: 24 All. 195; 10 C.W.N. 730: 3 C.L.J. 594; *Hira Naikin v. Rudha Naikin*, 37 Bom. 116; *Bireswar Mukherji v. Ardha Chandra* 19 I.A. 101: 19 Cal. 452; *Surendra v. Dassi*, 19 I.A. 102: 19 Cal. 815; *Re Blakes Trust*, (1904) 1 Ir. R. 98; *Ringo Balaji v. Mudireppa*, 23 Bom. 296; *Probodh v. Harish, infra*. Also see the decided cases (mentioned along with the illustrations) from which the illustrations have been taken. Again a bequest was made to "X." the testator's *Oursa* son, but the testator's son "X" was not his *Oursa* son; still the bequest to "X" was upheld, *Venkata Surya v. Court of Wards*, 26 I.A. 88: 22 Mad. 383: 3 C.W.N. 415 P.C. (on appeal from 20 Mad. 167); *Subbaraya v. Subhammi*, 27 I.A. 162: 24 Mad. 214: 4 C.W.N. 805 (P.C.). See also *Re Jameson* (1908) 2 Ch. 111; *Re Brocket*, (1908) 1 Ch. 185. A bequest to testator's wife, S, living at the date of the will, will not ensue for the benefit of a second wife whom the testator since married after the death of his former wife, S. Lakshmi

Narasammi v. Ammanna Siddhanti, 71 M.L.J. 845 - 1936 M.W.N. 902 - A.I.R. 1937

Description limited to Mad. 26 = 168 I.C. 247. That is to say, the description is limited to the *persona designata*, and does not extend to any other person who may happen to answer the description.

Thus, a gift to a *chela co-nomine* does not extend to another *chela* who comes in after the demise of the designated *chela* by virtue of a power of appointment exercised by the testator's widow according to his directions, *Kartar Singh v. Dayal Das*, I.L.R. (1939) Kar. (P.C.) 350 - 43 C.W.N. 1037 - 42 Bom. L.R. 1 - 1939 A.L.J. 809 - 1939 O.W.N. 634 - A.I.R. 1939 P.C. 201 - 182 I.C. 763 (P.C.). In the converse position, if the description of the *persona designata* turns out to be a misdescription, the *persona designata* will not fail to take on that account. Thus, a gift to a person named as an adopted son will not fail if the adoption is found to be invalid, *Navaneetha Krishna v. Collector of Tinnevelly*, 69 M.L.J. 692 - 1936 M.W.N. 1001 - A.I.R. 1936 Mad. 1017 - 160 I.C. 647, or is not effected at all, *Bhimayya v. Krishtagowda*, 30 Bom. L.R. 908 - 113 I.C. 251. A difficulty may arise when both the name and description are erroneous; in such a case the Court will see whether it can identify the *persona designata* from the words used in the will. Cf. *Ryall v. Hannam*, 10 Beav. 637. When the bequest is to a class of persons but the testator gives a wrong number of the persons constituting the class, the bequest takes effect with respect to the correct number and not to the wrong number quoted by the testator, *vide* illus. (iv); also *Garvey v. Hibbert*, 19 Ves. 125; *Newman v. Piercy*, 4 Ch. D. 41, but see *Glanville v. Glanville*, 33 Beav. 301; where a bequest is made with reference to a particular character, it will take effect if the *persona designata* can be identified notwithstanding the fact that the character given by the testator is wrong, *Anderson v. Berkely*, (1902) 1 Ch. 936; *Re Boddington*, L.R. 22 Ch. D. 597; *Re Wagstaff*, (1907) 2 Ch. 35. Cases of this kind when the description is given by relationship have been dealt with above, *vide* 9 Hare 485: (1902) 1 Ch. 930: 31 All 5 & 339: 28 All. 488: 37 Bom. 116, all *supra*. But when the attributed character or the alleged relationship is made a condition precedent, failure to answer the description is fatal, *Karambi Madhowji v. Kassandas*, 23 Bom. 271, P.C.; *Appu v. Kuppanammal*, 16 Mad. 365; *Surendra v. Doorga Soondery*, 19 Cal. 513, P.C.; *Probodh Lal v. Harish Chunder*, 9 C.W.N. 809; *Fanindra v. Rajeswar*, 11 Cal. 463, P.C.; *Khub Singh v. Ramji*, 41 Cal. 666; thus, a gift made to a spinster during her widowhood, will fail as the period for which the provision was made could not possibly exist, *Gale v. Gale*, (1941) 1 All. E.R. 329 (Ch. D.).

But when the character is not a condition precedent, but a mere description, the bequest takes effect the moment the designated person is identified; thus, where a bequest is made to A, and A is described as the person who will perform certain ceremonies. The bequest takes effect notwithstanding the fact that A does not perform the ceremonies or performs them ineffectually, *Nidhamoni v. Sarada*, 3 I.A. 253: 26 W.R. 91; *Rango Bilaji v. Mudiyepsa*, 23 Bom. 296; *Motilal v. Ram*

Mistake as to the number of persons constituting a class.

Described by character

identified notwithstanding the fact that the character given by the testator is wrong, *Anderson v. Berkely*, (1902) 1 Ch. 936; *Re Boddington*, L.R. 22 Ch. D. 597; *Re Wagstaff*, (1907) 2 Ch. 35. Cases of this kind when the description is given by relationship have been dealt with above, *vide* 9 Hare 485: (1902) 1 Ch. 930: 31 All 5 & 339: 28 All. 488: 37 Bom. 116, all *supra*. But when the attributed character or the alleged relationship is made a condition precedent, failure to answer the description is fatal, *Karambi Madhowji v. Kassandas*, 23 Bom. 271, P.C.; *Appu v. Kuppanammal*, 16 Mad. 365; *Surendra v. Doorga Soondery*, 19 Cal. 513, P.C.; *Probodh Lal v. Harish Chunder*, 9 C.W.N. 809; *Fanindra v. Rajeswar*, 11 Cal. 463, P.C.; *Khub Singh v. Ramji*, 41 Cal. 666; thus, a gift made to a spinster during her widowhood, will fail as the period for which the provision was made could not possibly exist, *Gale v. Gale*, (1941) 1 All. E.R. 329 (Ch. D.).

But when the character is not a condition precedent, but a mere description, the bequest takes effect the moment the designated person is identified; thus, where a bequest is made to A, and A is described as the person who will perform certain ceremonies. The bequest takes effect notwithstanding the fact that A does not perform the ceremonies or performs them ineffectually, *Nidhamoni v. Sarada*, 3 I.A. 253: 26 W.R. 91; *Rango Bilaji v. Mudiyepsa*, 23 Bom. 296; *Motilal v. Ram*

Khelawan, 72 I.C. 400. The whole key-note of this section is that the language of the will must show sufficiently who are meant by the description. So, a difficulty may arise when a number of people answer the description and it is not known who are definitely intended. Cf. *Stringer v. Gardiner*, 27 Beav. 25; *R. v. Ingle's Trust*, 11 Eq. 578. Where two persons answer a description, and one of them possesses the specified name as well, the bequest follows the name, *Dooley v. Mahon*, L.R. 11 Eq. 299; *R. v. Lyons Trust*, 48 L.J. Ch. 246.

A legatee may sometimes be described in such a way that the language of the description may involve a motive for the gift and in such a case, a question arises whether the failure of the description will imply the failure of the motive invalidating the gift or the defective description will be ignored so long as the *persona designata* can be identified. Thus, where a gift was made to a donee and his status was described as an adopted son, the Court held it to be a mere description and not the motive for the bequest with the result that the bequest would take effect even if the adoption be proved to be invalid. *Ali Bahadur Khan v. Hafiz Samiullah*, 11 O.W.N. 346 = A.I.R. 1934 Oudh, 137 = 148 I.C. 692.

77. [Suc. S. 64] Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.
When words may be supplied.

Illustration.

The testator gives a legacy of "five hundred" to his daughter A and a legacy of "five hundred rupees" to his daughter B. A will take a legacy of five hundred rupees.

N. B.—This section is applicable to the Hindus &c.

Omission Supplied by Context:—This section enables the Court to restore any word or limitation, omitted through inadvertance, or through want of skill and so forth, by reference to the general meaning or tenor of the will or its context. Cf. (1955) 2 All. E.R. 630. But no omission can be supplied under this section unless the same is warranted by the context or the general scheme of the will, *Abbot v. Middleton*, 7 H.L.C. 68; *Sutcliffe v. Sutcliffe*, (1957) 2 All. E.R. 467. The power conferred by this section should be sparingly and cautiously used, lest the Court should introduce into the will a meaning which was never intended by the testator, *Ibid.* Read also *Oruz v. Nagiah Naidu*, 55 M.L.J. 683. Consequently, no words can be supplied on a mere conjectural hypothesis of the testator's intention, *Scale v. Rawlins*, (1892) A.C. 342; *Clayton v. Glengell*, 1 Dr. & W. 1(41); *Gopal Krishna v. Ramrath*, 5 Bom. L.R. 729. It must be justified by the general

scheme of dispositions in the will. *Swaminatha Pillai v. Durai Swami*, A.I.R. 1927 Mad. 681=101 I.C. 82. It is an essential condition to the application of the section that the omitted word is material to the full expression of the meaning of the testator. It must be shown that the testator has meant so, but his words have failed. *Towns v. Wentworth*, 11 Moo. P.C. 526; *Mellor v. Daintree*, (1886) 33 Ch. D. 198. Cf. *Abbot's case supra*. Thus, a gift was made to A and B, and if either died before 21 and without issue, his share was to go to the survivor; but in the event of both dying without issue, then over. The Court supplied the words "under 21" before the last "without issue." *Kirkpatrick v. Kirkpatrick*, 18 Ves. 476. So in *Tara Churn v. Suresh Chanara*, 16 I. A. 106: 17 Cal. 122; the words, "if my minor son dies" were held to mean "dies before attaining full age". For other cases on the point, see *Mockondo Lal v. Ganesh Chunder*, 1 Cal. 104, *Narayan Das v. Administrator-General*, 21 Cal. 683; *Sweeting v. Prideaux*, L.R. 2 Ch. D. 413; *Re Redfern*, L.R. 6 Ch. D. 188; *Re Daniel's Settlement*, L.R. 1 Ch. D. 376; *Greenwood v. Greenwood*, L.R. 5 Ch. D. 954. For the supply of an omission caused by the copyist's slip, see *Phillips v. Rail*, (1906) 54 W.R. (Eng.), 517. For rectification of an obvious clerical error, see *Re Northern Estate: Sall v. Pym*, L.R. 28 Ch. D. 153; Cf. *Sweeting v. Prideaux*, L.R. 2 Ch. 413; for an accidental omission, see *Re Readfern*, (1877) 6 Ch. D. 138, *supra*. For transposition and change of words, see *Wingfield v. Wingfield*, (1878) 9 Ch. D. 668; *Doe v. Wilkinson*, 2 T.R. 228; no change will be allowed to defeat a vested interest, *Day v. Day*, Kay, 703. For an appreciation of the principle of this section, the following English cases may be consulted,—(1955) 2 All. E.R. 22 and (1955) 2 All. E.R. 316.

78. [Suc. S. 65] If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Rejection of erroneous particulars in description of subject.

Illustrations.

(i) A bequeaths to B "my marsh-lands lying in L and in the occupation of X". The testator had marsh-lands lying in L but had no marsh-lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous and the marsh-lands of the testator lying in L will pass by the bequest.

(ii) The testator bequeaths to A "my zamindari of Rampur." He had an estate at Rampur but it was a taluk and not a zamindari. The taluk passes by this bequest.

General Notes :—This section is applicable to the Hindus etc. It embodies the Latin maxim *Falso demonstratio non nocet* (6 T. R. 676)—a false description does not vitiate a document (Cf. 4 Exch. 604). There is an important limit to the application of this maxim, viz. *non accipi debent verba in demonstrationem falsam quo competit in limitationem veram* (Bao. Max. Reg. 3).—Words which agree in a true meaning ought not to be received in a false sense. It means that if it stand doubtful upon the words, whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. (See Latin for Lawyers, p. 208). **N. B.—**This limitation has been embodied in sec. 79 *infra*. The scope of the section is not to authorise the Court to enlarge the description beyond the bounds of its actual connotation. Thus, where a bequest is made of the personal effects in the testator's room, the Court will not enlarge the scope of the bequest so as to include the pass books and promissory notes in the testator's drawer in the room, *Kenneth De Sola v. Esther Phillips*, 67 M.L.J. 241—1934 A.L.J. 591—A.I.R. 1934 P.C. 125—150 I.C. 225 (P.C.).

Erroneous Description of Subject-matter :—This section lays down that if the subject-matter of a bequest can be sufficiently identified from the description given by the testator, the bequest will not fail, simply because some particulars of the description are erroneous. The erroneous part of the description will be rejected and the bequest given effect to, *Anderson v. Barkley*, (1902) 1 Ch. 936, or in other words, a false description by itself will not vitiate a legacy, *Schools v. Siebet*, 6 Sim., 1. So it has been held that the devise of one kind of property accurately described did not pass shares which were not mentioned in the will, *Tulsha v. Mathura Puri*, 33 All., 66. The characteristic of cases within this rule is that the description so far as it is false applies to no subject at all; and so far as it is true applies to one only, see *Morrell v. Fisher*, 4 Exch. 591 (604); *Whitefield v. Longdate*, 1 Ch. D. 64; a property not answering the specified description will not pass by the devise, *Homer v. Homer*, L.R. 8 Ch. D. 758; also *Morrel v. Fisher*, *supra*. When there is no property answering the description given in the will, the bequest altogether fails, *Barber v. Weed*, L.R. 4 Ch. D. 885. Cf. *Sintaya v. Savitri*, 4 Bom. L.R. 871. This section applies only where the false particulars are merely surplusage and the property is capable of being identified without such surplusage. Cf. *Webber v. Stanley*, 33 L.J.C.P. 217; *Dawes v. Miller*, (1908) 1 Ch. 185; *Re Milner Gibson*, (1924) 1 Ch. 456; the essence of the section is that there should be several particulars, some true and some false, and the true ones describe the property with certainty, *Cowen v. Truefitt Ld.*, (1899) 2 Ch. 809: 68 L.J. Ch. 563. For instance, the testator owns a property called "Black Acre"; it is in taluk "A", but the testator describes it as being in taluk A and B. Here the incorrect surplusage will be rejected. *Blaque v. Gold*, 4 Cro. Car. 447. Where the testator owned 2 *Kanis* of land, but devised only one *Kani*, the devisee will have the option to select any particular *Kani*, out of the two, *Narayansami v. Periatth-*

ambi, 18 Mad. 460. If the particulars of property subsequently enumerated in a will are not exhaustive of everything included in an earlier description, they will not have the effect of limiting the earlier comprehensive and generic description. *Elizabeth M. Toomey v. Bhupendra Nath Bose*, 7 Pat. 520 = A.I.R. 1928 Pat. 304 = 111 I.C. 57. As to whether a will be taken to cover the properties acquired since the date of the will, see *Lakshmi Narusammis v. Ammannan Siddhanti*, 71 M.L.J. 845 = 1936 M.W.N. 902 = A.I.R. 1937 Mad. 26 = 168 I.C. 247.

Evidence admissible to show mistake in description:—Under this section evidence can be adduced to show what was exactly the subject-matter of the devise, *Re Jamison King v. Winn*, (1908) 2 Ch. 111. But this certainly does not mean that evidence can be adduced to show that while the testator referred to one property, he meant another. Where an estate is devised by reference to the name of the mouja, evidence is admissible to show that lands beyond the specified mouja are within the estate, Cf. *Doe v. Earl of Jersey*, 3 B. & C. 870; in fact, evidence can be gone into in determining all questions as to situation, extent, mode of acquisition and possession of the subject-matter of the devise, *Doe v. Martin*, 4 B. & A.D. 771; *Castle v. Fox*, L.R. 11 Eq. 542.

79. [Suc. S. 66] If a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

When part of description may not be rejected as erroneous.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 78 shall be deemed to have been struck out of the will.

Illustrations.

(i) A bequeaths to B "my marsh-lands lying in L, and in the occupation of X". The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest will be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of X. (See *Morrell v. Fisher*, 4 Exch. 691.)

(ii) A bequeaths to B "my marsh-lands lying in L and in the occupation of X, comprising 1,000 bighas of lands." The testator had marsh-lands lying in L

some of which were in the occupation of X and some not in the occupation of X. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measurement will be considered as struck out of the will, and such of the testator's marsh-lands lying in L as were in the occupation of X shall alone pass by the bequest.

N. B.—This section applies to Hindus etc. It embodies the limitation to the maxim on which sec. 78 is based.

Where no Rejection of Description as erroneous:—We have seen that section 78 authorises rejection of erroneous particulars, but this section puts a limit to the power of such rejection and says that no particulars are to be rejected if it is found that a testator has a property which answers such particulars of description, and the devise will take effect with reference to the latter property; see *McMrell v. Fisher*, 4 Exch 591 (804); the explanation adds that the greatest number of particulars for which application is found should be ascertained after rejection of the false particulars under sec. 78, *supra*. The devise takes effect with respect to that property which best answers the description. Thus, a testator devised all his copyhold estates situate at X which he became entitled to on the decease of his father: It transpired that the testator came into possession of two copyhold estates after his father's death. One he inherited from his father, and the other one he got by surrender from his father while alive, though its possession was with his father till his death. Therefore, the inherited property was the only property to which he became entitled on the decease of his father, and the devise was operative only with respect to that property. *Doe d. Ryall v. Bell*, 8 T.R. 379. Cf. *Pullin v. Pullin*, 3 Bing 47. Again, where the testator devised only paths, the shumlat paths appertaining thereto were held not to pass therewith, *Tuisha v. Mathurapuri*, 33 All. 66. For a similar reason, a devise of lands at A but in occupation of B, will not include lands at A, but in the occupation of C. see *Homer v. Homer*, 8 Ch. D. 758.

Evidence:—As to the admissibility of extrinsic evidence, vide notes at pp. 149 and 167, the principle being the same, namely, that evidence is admissible to make the subject-matter certain or definite with reference to the testator's meaning as appearing in his language and not with reference to his intentions; and that is the reason why the property answering the description is selected and evidence is shut to show that the testator intended to bequeath the other property.

80. [Suc. S. 67] Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications

was intended.

Illustrations.

(i) A man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary." It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended. [See *Doe v. Hisocks*, 5 M. & W. 363; *Grant v. Grant*, L.R. 8 C.P. 727; *Fleming v. Fleming*, 1 H & C. 242].

(ii) A, by his will, leaves to B "my estate called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.

N. B.—The section applies to Hindus etc.

Extrinsic Evidence of intention in case of latent Ambiguity :— Where the terms of a will are clear and unambiguous, and apply to different subject-matters, of which only one is intended by the testator, extrinsic evidence can be let in to show which particular matter was intended by the testator. *Helley v. Helley*, (1902) 2 Ch. 866. Cf. (1955) 3 All. E. R. 691 [the case of philatelist's gift of his collection of stamps]. Where there is no ambiguity or obscurity there is no reason for the application of the doctrine that it is better to effectuate than to destroy the intention, *Suresh Chandra v. Lalit Mohan*, 22 C.L.J. 316; *Doe d. Hisocks v. Hisocks*, 9 L.J. Ex. N.S. 27. Where a devise was made to X, son of Gord, and both John Gord and George Gord had sons of the name of X, evidence was let in to show whether X, son of John Gord or son of George Gord was intended by the testator. *Doe d. Gord v. Needs*, 2 M. & W. 129; *Donaldson v. Bambar*, (1897) 1 Ch 75; *Re Bocket*, (1908) 1 Ch. 185; *Re Battie Wrightson*, (1930) 2 Ch. 830. Cf. *Stringer v. Gardiner*, 27 Beav. 35: 28 L.J. Ch. 768. External evidence is admissible only where the description is applicable to two things or two persons. *Re Taylor*, L.R. 34 Ch. D. 255; *London v. Ingram*, (1904) 2 Ch. 55; (1958) 1 W.L.R. 422; in *Henderson v. Henderson*, (1905) 1 R. 363, evidence was admitted to show which of the two grandsons was intended by the testator. Cf. *Re Vaughan*, 5 C.W.N. cclxxvi; where a bequest was made to the *Maharani Shaheba*, evidence was let in to show that the term applied to the elder of the two Ranees, *Indra Kunwar v. Jaspal Kunwar*, 15 I.A. 127: 16 Cal. 725, P.C. As to how far and when the attendant circumstances of a will can legitimately be considered, see *Belyea v. Melride*, A.I.R. 1943 P.C. 43=207 I.O. 258, P.C. In construing a will surrounding circumstances are material only in cases where the language of the instrument does not afford of itself

a clue to the intention of the testator, *Basavayya v. Venkatesan*, (1948) 2 M.L.J. 587 = 1948 M.W.N. 722 = 56 L.W. 722 = A.I.R. 1944 Mad. 176.

N. B.—The provisions of this section may profitably be compared with those of sections, 95, 96 and 97 of the Indian Evidence Act (1 of 1872), though they do not affect any of the provisions hereof as to construction of Wills, *vide sec. 100* of the Ind. Evidence Act. Cf. 5 C.W.N. 729, P.C., and 5 C.W.N. 505, and *Hassonally v. Popailal*, 37 Bom. 211.

When no evidence is admissible :—This section has application only where two things or two persons answer the description in the will, *vide Re Taylor's case, supra*, and the above. So where the *entire* description does not apply with equal propriety to both the objects or subjects but only applies partly to one and partly to another, extrinsic evidence is not admissible under this section, *Hisocks v. Hisocks*, 5 M. & W. 363; *Charter v. Charter*, 7 H.L. 364. Evidence is not admissible unless the ambiguity is latent or there is competition between two persons or two things, *Re Fish*, (1804) 2 Ch. 83; *Glassington v. Fellitt*, (1906) 2 Ch. 305; Cf. *Re Taffrey*, (1914) 1 Ch. 373; *Re Scotland National Society*, (1915) H.L. 29; *Ram Lochan v. Unnopoorna*, 7 W.R.C.R. 144. The special rule of this section does not affect the general rule that oral evidence may be allowed to show circumstances, habits and the state of the testator's family (including the names of the testator's family) on principles of justice, equity and good conscience, *Janardon v. Narayan*, 39 Bom. L.R. 1151 = A.I.R. 1937 Bom. 496 = 172 I.C. 401.

81. [Suc. S. 68] Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.

Illustrations.

(i) A man has an aunt, Caroline, and a cousin, Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "my aunt, Caroline" and 1,000 rupees to "my cousin, Mary" and afterwards bequeaths 2,000 rupees to "my before-mentioned aunt, Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "my before-mentioned aunt, Mary." The bequest is therefore void for uncertainty under section 89.

(ii) A bequeathes 1,000 rupees to..... leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(iii) A bequeathal to B rupees, or "my estate of ". Evidence is not admissible to show what sum or what estate the testator intended to insert.

N. B.—This section is applicable to Hindus etc. Compare this section with sec. 93 of the Ind. Evidence Act, which however does not apply to construction of wills, (sec. 100 of the said Act).

No Extrinsic evidence when ambiguity or Deficiency is patent:—Where there is an ambiguity or deficiency on the face of the will, extrinsic evidence of the testator's intention is not admissible, *vide illus.* (i), above; also *Re De Rosas*, (1877) 2 P. & D. 66 (68); *Re Hubbuck's Estate*, (1905) P. 129. So it has been ruled that parol evidence of intention (as distinguished from surrounding facts) is inadmissible in the case of patent ambiguities, *Hunt v. Hurt*, 3 Bro. C.C. 311. Cf. *Stringer v. Gardiner*, (1859) 27 Beav. 35. Thus, where a will provided, "My executor will retain in hand a sum of Rs. 5,000 out of which he will pay various petty sums to some poor people, who have been mentioned to him by me," it was held that there was a deficiency on the face of the will as to the objects of the bequest and no extrinsic evidence was admissible as to the intention of the testator, *Administrator-General v. Money*, 15 Mad. 448. The word deficiency includes cases of blanks, see illustrations (ii) & (iii); so where there is a blank as to the name of the person or the thing, evidence of intention is not admissible to supply the want, see *Edmunds v. Waugh*, 4 Drew, 275 (278); *Hunt v. Hurt*, *supra*; *Eaylis v. Attorney-General*, 2 Atk., 239; the position will be different when the blank is

Partial Blank.

not wholesale, but only *partial*, or the ambiguity is not
entirely removed.

Seeming Ambiguity

wide-spread, but only seeming, so that there are sufficient materials in the will itself, which interpreted in the light of surrounding circumstances (established by evidence) will fix

surrounding circumstances (established by evidence) will fix the identity of the person or the thing. For instance, when the blank is with respect to the surname (*Prince v. Page*, 4 Ves. 660); or when only the initials are given, (*Abbott v. Massie*, 3 Ves. 148); or where a bequest is made to "aforesaid nephews and nieces" without previously naming them, (*Campbell v. Bouskell*, 27 Beav 525); or "to my grand-daughter" without naming her, omissions may be cleared up with the help of evidence. Cf. (1905) P. 129, *supra*; also *Byabai Sakalkar v. Haridas*, 40 Bom., 1 : 17 Bom. L.R. 115 : 27 I.C. 946. When there is a deficiency in the will in the sense that the words are illegible and capable of being read in diverse ways, the Court will adopt that reading which is liberal and best accords with the surrounding circumstances, *Sarada Prosad v. Ramapati*, 17 C.W.N. 319. Where there is no ambiguity or deficiency on the face of the will and the intention of the testator sufficiently appears from its terms, the section will not apply and there will be no prohibition regarding the admission of oral evidence to show the circumstances, habits and the state of the testator's family (including the names of the testator's friends).

on principles of justice, equity and good conscience, *Janardan v. Narayan*, 89 Bom. L.R. 1151 = A.I.R. 1937 Bom. 496.

82. [Suc. S. 69] The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Meaning of clause to be collected from entire will.

Illustrations.

(i) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B, it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(ii) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first as if he had said "I give Black Acre to B, and all the rest of my estate to A."

N.B. — This section is applicable to Hindus etc. The rules of construction contained in secs. 82 to 87 of the Act have been applied to wills effected by the talukdars of Oudh, *Ramanuj Bhau v. Manraj Kuer*, 1935 O.W.N. 68 = A.I.R. 1935 Oudh, 198 = 168 I.C. 878. It is based on the Latin Maxim *Ex ante cedentibus et consequentibus fit optima interpretatio* (2 Inst 317) — From that which goes before and from that which follows, is derived the best interpretation. (see Latin for Lawyera, Maxim No. 229).

In re-enacting this section, the Legislature has omitted the last few words "and for this purpose a codicil is to be considered as part of the will" from the old section 69 and has transferred the same to the definition clause on "codicil," see sec. 2 (b), *ante*. For the effect of a codicil, see *Chukkhan Lal v. Lalit Mohan*, 24 Cal., 884; 1 C.W.N. 387, P.C. (on appeal from 20 Cal., 906); also *Reverend Lindon v. Ingram*, (1907) A.C. 494; *Deputy Commissioner v. Rani Bijai*, 22 C.W.N. 305, P.C.; *Re Bedson's Trust*, 28 C.D. 523; *Hartley v. Tribben*, 16 Beav., 510; *Re Bates*; *Selms v. Bates*, (1925) 1 Ch. 157 : 94 L.J. Ch. 190.

Meaning to be collected from entire Will : — "The true mode of constituting a will is to consider it as expressing in all the parts, whether consistent with law or not the intention of the testator and to determine upon a reading of the whole will

whether, assuming the limitation therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred," *Tagore v. Tagore*, 9 B.L.R. 377 : 18 W.R. 559. "Every part of the instrument should be brought into action in order to collect from the whole one uniform and consistent sense," *Barton v. Fitzgerald*, 15 East, 680; *McCowan v. Baines*, (1891) A.C. 401 (408); *McCormick v. Simpson* (1907) A.C. 494. The intention of the testator

Will to be construed
as a whole,

has to be gathered from the will itself taken as a whole,
Annada Charan v. Kama Sundari, 66 C.L.J. 88 = A.I.R. 1936

Cal. 405 = 166 I.C. 892; *Ram Rakhi v. Peoples' Bank of Northern India Ltd.*, A.I.R. 1942 Lah. 42 = 199 I.C. 677. Read the notes under the heading, "Intention how gathered" under sec. 87, post; *Madhava Rao v. Administrator-General of Madras*, (1941) 2 M.L.J. 677 = 1941 M.W.N. 778 = A.I.R. 1942 Mad. 17 = 201 I.C. 143; also A.I.R. 1954 All. 716. So, it has been said that in construing a will, importance should not be attached to isolated expressions, but the Court must look to all the clauses of the will, and give effect to all the clauses ignoring none as redundant or contradictory, *Sheb Lakshmi v. Terangeni*, 8 C.L.J. 20; *Kandarpa Nath v. Jogendra Nath*, 12 C.L.J. 391; *Chukkhun Lal's case, supra*; *Oheda Lal v. Gobin Ram*, 30 All. 466; *Shaukmay v. Monohari*, 12 I.A. 103 : 11 Cal., 684; *Wilson v. Oakes*, 31 Mad. 283; *Din Tarini v. Krishna Gopal*, 16 Cal., 149 (156); *Key v. Key*, 4 DeG.M. & G. 73 (85); *Kallidas Mullick v. Konhys Lal*, 11 I.A. 218; 11 Cal. 121, P.C.; *Ramlal Mookherji v. Secretary of State*, 8 I.A. 46 : 7 Cal., 304; *Shumsool Huda v. Shewukram*, 2 I.A. 7 (15) : 14 B.L.R. 126; *Amirthyan v. Ketharamayyan*, 14 Bom. 65; *Yorke v. Tirbhuvandas*, 19 Bom. 401; *Administrator-General v. White*, 13 Mad. 379; *Somasundara v. Ganga*, 18 Mad. 366; *Ram v. Vijayaragavalu*, 31 Mad. 840; A.I.R. 1954 Mad. 19; *Hara Kumari v. Mohim Chandra*, 7 C.L.J. 542; *Gulbajji v. Rustomji*, 49 Bom. 478 = 27 Bom. L.R. 360 = A.I.R. 1925 Bom 282; *Kanhaylal v. Hira Bibi*, 15 Pat. 161 = A.I.R. 1936 Pat. 323 = 163 I.C. 940; *Belyea v. McBride*, A.I.R. 1943 P.C. 43 = 107 I.C. 258 (P.C.); *Sansar Chand v. Durga Dasi*, 1933 A.L.J. 1496 = A.I.R. 1984 All. 98 = 149 I.C. 648; *Krishnaswami Sastrigal v. Avayambal Ammal*, A.I.R. 1933 Mad. 204; *Manekji Rustomji v. Nanabhai*, 53 Bom. 724 = 31 Bom. L.R. 969 = A.I.R. 1930 Bom. 39 = 120 I.C. 842; *Panchu Gopal v. Kunja Behari*, 98 C.L.J. 98 = A.I.R. 1957 Cal. 110. Likewise, it has been held in England that effect should be given to every word in the will, *Constantine v. Constantine*, 6 Ves., 100; Cf. *Re Hunter*, (1897) 2 Ch., 105; or to put it enigmatically, "every string ought to give its sound." Read also the notes under sec. 85, post; also read *V Leg. Miscellany*, p. 124. Where the testator has executed two wills within a short compass of time, one relating to properties within the jurisdiction of the Court and the other relating to properties outside jurisdiction, the Court read the two documents together, *Ahroness Shemal v. Sheikh Ahmed Omar*, 33 Bom. L.R. 1056 = A.I.R. 1931 Bom. 199 = 136 I.C. 817. Cf. A.I.R. 1956 Mad. 248.

Use of void Clause:—A clause that is void for uncertainty (sec. 89) or for

being opposed to the rule of Perpetuity, is of no importance for the purpose of distribution of the estate; but for the purpose of construction of the will, and for ascertaining the meaning of its language, even such an inoperative clause has its use, *Administrator-General v. Money*, 15 Mad. 448. Cf. *Shyama Charan v. Naba Chandra*, 11 I.C. 734 (Cal.). A revoked will may also serve the same purpose, *Faiz Muhammad v. Muhammad Sayid Khan*, 25 I.A. 77(82) : 25 Cal. 816 (P.C.).

83. [Suc. S. 70] General words may be understood in a restricted sense where it may be collected from the

When words may be understood in restricted sense, and when in sense wider than usual. will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

Illustrations.

(i) A testator gives to A "my farm in the occupation of B," and to C "all my marsh-lands in L." Part of the farm in the occupation of B consists of marsh-lands in L, and the testator also has other marsh-lands in L. The general words, "all my marsh-lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh-lands in L.

(ii) The testator (a sailor on ship-board) bequeathed to his mother his gold rings, buttons and chest of clothes, and to his friend, A (a shipmate), his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest. [See *Cook v. Oakley*, 1 P. Wms., 902].

(iii) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

N.B.—This section applies to Hindus &c.

The Rule in the Section:—The section lays down that if the language of the will so permits, general words in it may be understood in a restricted sense and vice versa. The principle of this section may be summed up in Lord Bacon's maxim, *Noscitur a sociis*, (3 T.R. 87)—the meaning of a word may be ascertained by reference to those associated with it. "It is a general rule of construction that

where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class." *Lyndon v. Standbridge*, 2 H. & W. 51. Thus, a testator bequeathed his furniture, plate, chins, pictures and all other goods of whatever kind, and this general expression *all other goods* was taken to be restricted to goods *ejusd.m generis* with the class (i.e. household goods). *Wrench v. Jutisng*, 3 Beav., 621; *Rawling v. Jennings*, 13 Ves., 39. Likewise, the principle of *ejusdem generis* was applied with respect to the word "effects," *Prichard v. Prichard*, L.R. 11 Eq 232; and the phrase "all the rest", *Attree v. Attree*, 11 Eq. 280. No hard and fast rule can be laid down as to what words are to be understood in a wider sense, and what in a narrower sense. Thus, the word "money" was understood in the restricted sense of G. P. Notes in *Dawson v. Gascoine*, 2 Keen, 14; and in that of "general personal estate" in *Cheda Lal v. Gobin Ram*, 30 All., 455; in the sense of "stock" in *Prichard's case, supra*. Cf. *Price v. Newton*, (1905) 2 Ch. 75; *Webb v. Derbyshire*, (1906) 1 Ch. 185; *Cadagan v. Palagi*, L.R. 25, Ch D. 154; *Callow v. Callow*, 42 Ch. D., 560; for the word "securities" see *Re Sconer : Burtt v. Harrison*, 94 L.J. Ch. 196; as to how the words, "issue," "male issue," "heirs," "heirs male," "males," "children" and so forth have been understood in restricted and narrower senses in different cases, see *Brahmanayee v. Jogesh*, 8 B. L. R. 400; *Kristicromoney v. Narendra Krishna*, 16 I.A. 69 : 16 Cal. 383; *Krishnarao v. Benabai*, 20 Bom., 571; compare *Amirthayyan v. Ketharamayyan*, 14 Mad. 68; "Maharani Shabebe" was restricted to the elder Rani in *Indra Kunwar v. Jaipal Kunwar*, 15 I.A. 127; 15 Cal., 725. For other instances of such restricted or wide interpretation, see *Fanindra Kumar v. Administrator-General*, 6 C.W.N. 321; *Khetler Mohan v. Gunganarain*, 4 C.W.N. 671; *Rameshar v. Arjun Singh*, 23 All. 194, P.C.; *Wappell v. Robinson*, (1908) 1 Ch. 185. As to how the words *NALIK* and *PUTRA FOUTRADI KRAMB* have been variously interpreted, vide notes at pp. 145-46, ante.

84. [Suc. S. 71] Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

Which of two possible constructions preferred.

N. B.—This section is applicable to Hindus &c.

Clauses open to double Construction :—The section says that when a clause is open to a *two-fold* construction, then that construction is to be accepted which renders the will operative. Thus, their Lordships of the Judicial Committee have said "a difficulty created by a particular expression in a will may be solved by adopting the construction which bespeaks a reasonable, and probable intention, and rejecting that which would indicate an intention unreasonable, capricious, and

inconsistent with the testator's views, as evidenced by his conduct and by the dispositions of his will," *Indar Kunwar v. Jaipal Kunwar*, 15 I.A. 127; 15 Cal. 726 (P.C.). For the principle enjoining acceptance of the construction leaning towards testacy and operation of the will, see the following cases, *Akhay Chunder v. Kala-pahar*, 12 I.A. 198; 12 Cal. 406; *Johnson v. Crook*, L.R. 12 Ch. D. 639; *Bhoobun Mohini v. Hurish Chunder*, 5 I.A. 138; 4 Cal. 23; *Amirthayyan v. Ketharamayyan*, 14 Mad. 65; *Ram Lal Mukherji v. Secretary of State*, 7 Cal. 304 (S17); there are two modes of reading an instrument; where the one destroys and the other preserves, it is the rule of law and of equity (following the law in this respect), that you should rather lean towards that construction which preserves than towards that which destroys, *Langston v. Langston*, 2 Cl. & F. 194 (243), cited in *Advocate-General v. Hormajji*, 29 Bom. 375; the Court must lean against a construction involving an intestacy, *Ellokasee v. Durponarain*, 5 Cal. 69 (63); compare also *Karsandas v. Ladkavahu*, 12 Bom. 185 (199); *Mandakini v. Arunbula*, 8 C.L.J. 515; *Sarada Prasad v. Banapati*, 10 C.L.J. 304; 17 C.W.N. 819; *Mandakini v. Adinath*, 10 Cal. 60; *Padajirao v. Ram Rao*, 13 Bom. 160; *Ranjit Lal v. Bejoy Krishna*, 89 Cal. 582; *Abbot v. Middleton*, (1858) 7 H.L.C. 68; *Re Whitmore*, (1902) 2 Ch. 66; *Re Rayner*, (1904) 1 Ch. 176; *Stephen v. Cunningham*, 89 Ch. D. 426; *Bachman v. Bachman*, 6 All., 589; but where the will in express words says that there is no need for any will as regards the moveables, such moveable will pass as on intestacy as they stand untouched by the will, *Satish Chandra v. Nsladrinath*, 89 C.W.N. 287 = A.I.R. 1936 Cal. 788.

85. [Suc. S. 72] No part of a will shall be rejected as No part rejected, if it destitute of meaning if it is possible to put a can be reasonably reasonable construction upon it.

N.B.—This section applies to Hindus &c

No Rejection of Part capable of Construction:—So long as a meaning can be assigned to a part of the will, it should not be rejected, see *Chambers v. Brailsford*, (1816) 19 Ves. 652; *Towns v. Wentworth*, (1856) 11 Moo. P.C. 526. The object of the section is obviously to give effect to the intentions of the testator as far as practicable, (Cf. *Dinbai v. Nusserwanji*, 17 Bom. L.R. 182; 28 I.C. 481); and not to frustrate them, *Anantha Sayana v. Kondappa*, (1940) 1 M.L.J. 212 = 1940 M.W.N. 269 = A.I.R. 1940 Mad. 479 = 191 I.C. 17. Every portion of a will must be given full effect to according to its natural and grammatical sense, and no portion of it should be rejected unless such a construction makes the provisions of the will inconsistent with each other, or leads to results which must be repugnant to the testator's idea of property, *Romachandra v. Vijayaragavalu*, 31 Mad. 349; *Shamavahoo v. Dwarkadas*, 12 Bom. 202 (on a question of the position of the dot). But an attempt should always be made to reconcile the seemingly inconsistent

clauses, [*Anukul Chandra v. Gurupada Haldar*, A.I.R. 1936 Cal. 643—168 I.C. 366], and to avoid repugnancy between one provision and another in a will. Thus, in an Oudh case there was a seemingly absolute estate coupled with a gift over and the Court gave effect to both the parts of the legacy but cutting down the so-called absolute estate to a mere life estate, see *Swamidayal v. Ramadhar*, 8 O.W.N. 566=A.I.R. 1931 Oudh, 358=134 I.C. 865; read in this connection the other cases cited under sec. 95, *post*, in which the repugnant gifts over were rejected in consequence of irreconcilability. If there be no repugnancy between the different provisions of the will and if there be no ambiguity about the intentions of the testator or no contravention of any statutory provision, the Court should give effect to the wishes of the testator as if it were seated in the deceased's arm-chair, *Gnanbal Ammal v. Raju Ayyar*, 1961 S.C.J. 171=1960 P.C.R. 949=A.I.R. 1961 S.C. 103. As to circumstances which can justify rejection of words, see *Campbell v. Bouskell*, 27 Beav., 325; *Coryton v. Helyar*, 2 Cox 340.

86. [Suc. S. 73] If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

N. B—This section is applicable to Hindus &c.

Same Word in Same Sense:—This section says that the same word in different parts of a will should be given the same meaning. This is the necessary corollary of the rule that the will is to be construed as a whole. Thus, in *Krishna-rao v. Benabai*, 20 Bom., 571, the word "children" was understood all through to apply equally to sons and daughters. Cf. Kenyon's case, *infra*. In *Jairam Narayan v. Kessowji*, 4 Bom. L.R. 555, the will provided that the testator's son was to be the owner of the property and in absence of a son, the wife was to be the owner; and in interpreting the word "owner" in the same sense in both the places, the gift to wife was taken as an absolute one; see also *Rhodes v. Rhodes*, (1869) 27 Beav. 413; *Re Birks*: *Kenyon v. Birks*, (1900) 1 Ch. 417; *Sibley v. Perry*, 7 Ves. 522; *Edyvean v. Archer*, (1903) A.C. 379. The rule of the section is subject to one limitation, viz. it will not apply where there is clear indication that the testator intended to use the word a second time in a different sense, see *Aghore Nath v. Kamini Debi*, 11 C.L.J. 461; vide also *infra*.

The Limitation to the Rule:—The same word is to be interpreted in the same sense throughout the will unless a contrary intention appears, vide *Aghore Nath's case*, *supra*. Thus, context may preclude the same expression from being taken to mean the same thing, *Ballin v. Ballin*, 7 Cal., 218 (228). Thus, in *Purchoo Money v. Troyluck*, 10 Cal. 842; the word "malik" when applied to a gift to a widow

was held to mean a *life estate*, that is in a different sense from what it would imply when applied to the son. Cf. *Shamarahoo v. Dwerkadas*, 12 Bom. 202. To put the matter briefly, the rule of this section cannot have application unless warranted by the context, *vide Rhodes's case* and other cases, *supra*; also *Campbell v. Campbell*, 4 Pro. C.C. 15; the *contrary* intention excluding the operation of the section should be clearly indicated, *Harvey v. Harvey*, 92 Beav. 441.

Construction of "legacy given free of all duties": Such a legacy is to be paid free of income-tax only if such an intention can clearly be ascertained from the rest of the will, *Deputy Custodian of Enemy properties v. Mercantile Bank of India*, 48 C.W.N. 208.

87. [Suc. S. 74] The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration.

The testator by a will made on his death-bed bequeathed all his property to C D for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under section 118, but it will take effect so far as regards the gift to C D.

N.B.—This section applies to Hindus &c. It is based on the rule in the case of *Thellusson v. Woodford*, 4 Ves. 326.

Testator's intention to be carried into effect as far as practicable:—If it is possible to give effect to the will, it should be done by all means. The fact that a person has made a will clearly shows that he is very reluctant to die *intestate*, and the Court should regard his wishes so far as it can, and should therefore

Court should lean always favour a construction that leads to testacy than to against intestacy *Re Harrison*, (1885) 3 Ch. D. 390 (392); *Kirkmuth*

v. *Parnell*, (1903) 1 Ch. 483—relied on in *Paturbai v. Chuharmal Mulchand*, A.I.R. 1929 Sind. 19=114 I.C. 105; *Manekji Rustomji v. Nanabhai*, 63 Bom. 724=31 Bom. L.R. 969=A.I.R. 1930 Bom. 33=120 I.C. 842; *Southey v. Scmerville*, 13 Ves. 486; *Tarukessur v. Sashishikheressur*, 10 I.A. 51: 9 Cal. 952 (on appeal from 6 Cal. 424); *Shookmoy v. Monohari*, 7 Cal., 269; *Kristoromoney v. Narendra Krishna*, 16 I.A. 29: 16 Cal., 383; *Lal Behary Dhur v. Administrator-General of Bengal*, 39 C.W.N. 46=A.I.R. 1936 Cal. 284=155 I.C. 1071. *Comp Puruttam Das Agarwala v. Gobind Prosad*, 43 C.L.J. 465=61 M.L.J. 6=24 A.L.J. 655=28 Bom. L.R. 917=A.I.R. 1926 P.C. 52 (P.C.). But where the

language is clear and unequivocal, the construction cannot be altered or wrested to something different from the plain meaning, for the purpose of, escaping from the harsh consequences of rules of law, *Suresh Chandra v. Lalit Mohan*, 20 C.W.N. 469 (471); 23 C.L.J. 816 : 31 I.C. 405. The rule which requires the Court to construe a will as to avoid intestacy, does not imply that for the purpose of avoiding intestacy, the Court is entitled to misconstrue a will, *Ali Razakhan v. Nawazish Ali*, 1938 O.W.N. 1157. Thus, the position is that although in construing a document purporting to be a will, the Court will lean against intestacy, it is also the plain duty of the Court not to create a will where there is none, *Fatima Kuberbai v. Kasumbabai*, 1 L.R. (1940) Bom. 761-42 Bom. L.R. 827-A.I.R. 1940 Bom. 382-192 I.C. 481 [the words of the will not to be strained beyond their possible meaning]. Effect should be given to the testator's intention as far as possible. *Comp. Kishammal v. Saraswati Bai*, (1938) 2 M.L.J. 1010-1938 M.W.N. 1152-A.I.R. 1938 Mad 112-179 I.C. 749. So, in construing wills the primary duty of the Court is to find out the intention of the testator. Such intention has to be gathered from the language used by the testator; but the meanings attached to his words may be affected by surrounding circumstances, and when this is the case, those circumstances should be taken into consideration, *Mst. Bishan Devi v. Jagat Singh*, 39 P.L.R. 591-A.I.R. 1937 Lah. 353-173 I.C. 277. No indication of intention is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the will. Necessary implication does not mean natural necessity, but so strong a possibility of intention, that a contrary intention cannot be supposed, *Lokenath Mukherjee v. Abans Nath*, 72 C.L.J. 362-A.I.R. 1941 Cal. 68-194 I.C. 874. When it is impracticable to give effect to the testator's intentions, for instances when the will offends against the rule of Perpetuity or establishes altogether a new line of succession unknown to law, this section will not apply, see *Tayore v. Tagore*, 9 B.L.R. 377; *Adipuram v. Appusundaram*, 5 M.L.T. 103 : 2 I.C. 311. Cf *Re Birkett*, L.R. 9 Ch. D. 575; also A.I.R. 1961 S.C. 1802.

Intention how gathered:—The intention of the testator has to be gathered from the wordings of the will taken as a whole and not by evidence *altiude*, *Sasanka Bhutan v. Gopi Ballav*, A.I.R. 1936 Cal. 716-159 I.C. 487; *Annada Charan v. Kamala Sundari*, 66 C.L.J. 88-A.I.R. 1936 Cal. 405-166 I.C. 892; *Nitwar v. Mt. Loi*, A.I.R. 1930 All. 652; *In re Twaddling*, 1935 A.L.J. 1207; *Khajeh Habibulla v. Ananga Mohan*, I.L.R. (1942) 2 Cal. 363-75 C.L.J. 279-46 C.W.N. 719-A.I.R. 1942 Cal. 571-202 I.C. 90; *Nisar Ali v. Muhammad Ali*, 6 O.W.N. 519-A.I.R. 1929 Oudh, 494-119 I.C. 897. This is so, because it is by the words of the will, that the testator has expressed his mind, *Rameswar Baksh v. Balraj Xuar*, 40 O.W.N. 8-37 Bom. L.R. 862-1936 M.W.N. 1122-1936 A.L.J. 1183-37 P.L.R. 666-A.I.R. 1936 P.C. 187-167 I.C. 888 (P.C.). As the wordings of the testator may be affected by surrounding circumstances, such circumstances may have to be looked into and for that purpose resort to extrinsic evidence may be

necessary, see *Mat. Bishan Devi v. Jagat Singh, supra*. As to when extrinsic evidence can be let in to gather the intention, read the notes under sec. 80, ante. If the testator's intention in a will has been made by himself clearer and more explicit in a subsequent codicil that can be looked to for the purpose of gathering his intentions, *Rameshwar Baksh v. Balraj Kuar, supra*. When there is no ambiguity in the language of the will as to the real intentions of the testator, it is no use embarking on a speculation regarding the same, *Gopaldas v. Hemandas, I.L.R. (1942) Kar. 392 - A.I.R. 1942 Sind, 145 - 208 I.C. 290; Golak Behari v. Suradhanis Dasi, I.L.R. (1989) 1 Cal. 63 - 68 C.L.J. 246 - A.I.R. 1989 Cal. 296 - 181 I.C. 705*. To proceed on a hypothetical intention or to attempt to supply lacunae in the will is virtually to make a new will for the testator, *Lokenath Mukherji v. Abaninath, 72 C.L.J. 362 - A.I.R. 1941 Cal. 69 - 194 I.C. 874; Kartar Singh v. Dayal Das, 43 C.W.N. 1017 - I.L.R. (1989) Kar. (P.O.) 850 - 1989 A.L.J. 809 - 1989 O.W.N. 684 - 42 Bom. L.R. 1 - A.I.R. 1989 P.O. 201 - 182 P.O. 763 (P.C.)* Where the language of the will is clear and unambiguous, there is no question of finding out the intention of the testator, *Mt Jio v. Mt Rukuran, 8 Lab 219 - 28 P.L.R. 78 - A.I.R. 1927 Lab, 126 - 100 I.C. 64*, and it is then not necessary for the Court to go beyond the four corners of the will or to resort to the artificial rules of construction, *Manikam Pillai v. Vankatesw Chetty, A.I.R. 1927 Mad. 494 - 99 I.C. 705*, or to speculate about the possible intention of the testator, *Lokenath Mukherji v. Abaninath, supra*. As to how far the surrounding circumstances can be looked to for the purpose of gathering the intention of the testator, read the notes at p. 169, against the marginal, "Relevancy of surrounding circumstances"; read also *Rajendra Prosad v. Gopal Prosad, 57 I.A. 296 - 10 Pat. 187 - 52 C.L.J. 287 - 34 C.W.N. 1161 - &c (P.C.) cited at p. 141, ante*. If the intention of the testator is not sufficiently clear from the language of the will, a Court of construction has got the power to supply the deficiencies of language or verbal construction, *Ali Rajakhan v. Nawazish Ali, 1988 O.W.N. 1187*, and look to the surrounding circumstances and have a vision as if it were in the arm-chair of the testator, see *Rajendra Prosad v. Gopal Prosad, supra*. Where the testator has left two wills executed within a short compass of time, one relating to properties within the Court's jurisdiction and the other relating to properties outside the Court's jurisdiction, the testator's intentions have to be gathered from a reading of the two wills together, *Akrones Shemarl v. Sheikh Ahmed Omer, 33 Bom. L.R. 1056 - A.I.R. 1931 Bom. 533 - 186 I.C. 817*.

88. [Suc. S. 75] Where two clauses or gifts in a will are irreconcileable, so that they cannot possibly stand together, the last shall prevail
 The last of two inconsistent clauses prevales.

Illustrations.

- (i) The testator by the first clause of his will leaves his estate of Ramnagar "to A," and by the last clause of his will leaves it "to B and not to A."

B will have it.

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

N. B.—This section applies to Hindus &c.

Last Clause Prevails:—The rule of this section is based on the Latin maxim *Cum duo inter se pugnantia revertuntur in testamento ultimum ratum est* (Co. Litt. 112) Where two clauses in a will are repugnant one to the other, the last in order shall prevail, (see Latin for Lawyers, Maxim No. 168 at p. 143); also see *Ulrich v. Litchfield*, 2 Atk. 372. Cf. *Amirthayyan v. Ketharamayyan*, 14 Mad. 65; also A.I.R. 1962 Mad. 247; *Constantine v. Constantine*, 6 Ves. 100; *Sims v. Doughty*, 5 Ves. 243. Thus, where the will first gave an absolute interest and subsequently made provisions which indicated that only a life-interest was intended to be given, the Court held that the subsequent provision conferring life-estate prevailed, *Soma Sundaram v. Gunga Bissen*, 28 Mad. 385; *Vithal v. Narayan*, A.I.R. 1931 Nag. 69 = 184 I.C. 253; *Gulbaji v. Rustamji*, 49 Bom. 478 = 27 Bom. I.R. 860 = A.I.R. 1926 Bom. 282. The essence of this section is that the two provisions should be irreconcilably repugnant to each other, *vide* notes under the heading "Limitations to this Rule" below. As to an instance of concurrent gifts, see *Indar Kunwar v. Jaipal*, 15 I.A. 127; 15 Cal. 725. As to instances how one of two inconsistent clauses is rejected, see *Cally Nath v. Chunder Nath*, 8 Cal. 878; *Tulsha v. Mathusapuri*, 6 I.C. 794. Of course, where there is no repugnancy, the clauses will be taken together, *Fatih Chand v. Rup Chand*, 43 I.A. 183; 38 All. 449; 26 C.L.J. 182; 21 C.W.N. 102 (P.C.), and it is always a sound principle to remember that when considering the general residuary clause in a will, the Court must give a meaning to the earlier provisions, otherwise there will be no sense in sec. 82, which insists on collective consideration of all the clauses in a will, *Madhava Rao v. Administrator-General of Madras*, (1941) 2 N.L.J. 677 = 1941 M.W.N. 773 = A.I.R. 1942 Mad. 17 = 201 I.C. 143. Cf. *Jeevikore Bhai v. Krishnadoss*, 69 M.L.J. 242 = 1932 M.W.N. 1002 = A.I.R. 1932 Mad. 680 = 189 I.C. 188.

Limitation to this Rule:—This rule will not apply unless the intention to cut down a foregoing provision is *very clear*, *Soma Sundaram v. Gunga Bissen*, 28 Mad. 386; so it has been held that a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention, *Beskar v. De Cruz*, 19 Bom. 770; or, in other words, the rule comes into operation only when there is no indication as to which of two contrary intentions was the final wish of the testator, *Bywater v. Clarke*, 19 Ch. D. 17 (19); *Beggar v. Eastwood*, 15 Ir. R. 219. The Court should see which clause is the real dispositive clause, *Jeevakore Bhai v. Krishnadoss*, 69 M.L.J. 242 = &c., *supra*. The rule is not applied unless reconciliation between

two provisions is impossible. So, where the inconsistent clauses refer to different subject matters this section has no application, *Advocate-General v. Hormaji*, 29 Bom. 875. Thus, their Lordships of the Judicial Committee have observed that where the clauses of a will provide for different circumstances they must be read together, reconciled and treated as mutually explanatory of each other, *Damodardas v. Dayabhas*, 26 I.A. 126 = 22 Bom. 883 : 2 C.W.N. 417 (P.C.) Cf *Sherrit v. Bently*, 2 My. & K., 149 (165). Where an absolute interest with full power of alienation has been conferred, the mere pious wish asking the donee not to alienate a part of the devised property will not cut down that interest, *Mokshadas Ranjan v. Surendra Bijoy*, 68 C. L. J. 22 = A.I.R. 1939 Cal. 40. Read also the notes under see. 95, post.

Conflict between earlier general description and subsequent particular description of property :— If the particulars of the property subsequently enumerated in a will are not exhaustive of everything included in the earlier general description, it should not limit the meaning of the earlier comprehensive and generic description of the subject-matter, *Elizabeth M. Toomey v. Bhupendranath Bose*, 7 Pat. 520 = A.I.R. 1928 Pat. 304 = 111 I.C. 57 ; also *West v. Lawday*, 11 H.L.C. 875 ; conferment of an absolute interest in an earlier part of the will coupled with the imposition of a restriction of that interest in a subsequent clause, in the event of a certain contingency, is construed so as to render the subsequent clause a proviso for the earlier one, *Narayan Doss v. Arumugathammal*, A.I.R. 1958 Mad. 481.

89. [Suc. S. 76] A will or bequest not expressive of any definite intention is void for uncertainty.

Will or bequest void
for uncertainty.

Illustration.

If a testator says "I bequeath goods to A," or "I bequeath to A," or "I leave to A all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath 'money,' 'wheat,' 'oil'" or the like, without saying how much, this is void.

N. B. — This section is applicable to the will of a Hindu etc.

Void for uncertainty :— A will or bequest which does not express any definite intention is void for uncertainty, *Asten v. Asten*, (1894) 3 (h) 260. The uncertainty may be with respect to the object or the person for whom the bequest is intended or with respect to the thing bequeathed or the subject matter of the bequest. This rule is generally inapplicable to charitable bequests for which *vide infra*. This is so because the law ordinarily looks upon charitable bequests with a certain amount of favour and always tries to give effect to them if possible ; and for this purpose,

it has tolerated the testator's power to clothe his trustees with a right to nominate the objects of disposition. But even in that matter too, a certain degree of certainty in the selection of objects should be ensured, otherwise the bequest will fail altogether. *Attorney-General of Newzealand v. Newzealand Insurance Co. Ltd.*, 41 C.W.N. 321—(1937) 1 M.L.J. 58—1937 M.W.N. 196=A.I.R. 1937 P.C. 8—166 I.C. 833 (P.C.). A bequest to four persons with a direction that the donees are to keep the property as *tawad* is void for uncertainty as also for offending against the rule against perpetuity. *Meherwan Jehangir v. Dhunbhais Kavasha*, (1940) 1 M.L.J. 918—1940 M.W.N. 569—A.I.R. 1940 Mad. 785.

Uncertainty of Object or Legatee:—Such uncertainty may arise from (a) vague and indefinite description or (b) non-determination of the number of persons taking. Thus, a bequest to the son of X (*Strode v. Falkland*, 2 Vern., 624; *Re Baylis's*, 2 Sw. & Tr. 613), or to a blank name, not being the surname or the Christian name, *Baylis v. Attorney-General*, 2 Atk. 289), or to unnamed relations or next-of-kin (*Crampton v. Wise*, 58 L.T. 718) is void for uncertainty. Compare the notes under sec. 81, *supra*; also *Re Blackwell*, L.R. 2 P.D. 72; *Lowndes v. Stone*, 4 Ves. 649. Likewise, an ultimate gift to "agnates and Brahmins" may be said to be invalid for uncertainty. *Shyama Charan v. Sarup Chandra*, 17 C.W.N. 39: 14 I.C. 708. But see *Fanindra Kumar v. Administrator-General*, 6 O.W.N. 321 (the Campbell Hospital case). A direction to pay debts including charities and subscriptions promised is void for uncertainty and oral evidence cannot be let in to show for which persons the charities have been intended or to whom the subscriptions have been promised. *Dinanath v. Hansraj Gupta*, 62 Cal. 190=A.I.R. 1936 Cal 44—160 I.C. 1056. A gift to an adopted son on condition he should be of good behaviour is not invalid for vagueness. *Surendra v. Kalachand*, 12 C.W.N. 668. Likewise, a bequest to the future wife of an unmarried son is valid, if the girl to be married be in fact born (during the testator's life-time, or perpetuity limit). *Dinesh Ch. v. Kumari Biraj*, 15 C.W.N. 945. Compare also *Shyama Charan v. Naba Chandra*, 11 I.C. 704 (Cal.).

Uncertainty of Subject-matter:—A gift may be void for uncertainty when the description of the bequeathed thing or the mode of application of the property is so vague that it cannot be ascertained. Thus, a bequest of "my linen", without specifying the quantity (*Peck v. Halsey*, 2 P. W. 357); or of "the bulk of my property" (*Palmer v. Simmonds*, 2 Drew., 224); or of a "handsome gratuity" (*Re Jubber*, 9 Sim. 503; *Pushman v. Fillister*, 3 Ves., 7) is void on the ground of uncertainty, being unascertainable; vide also *Mokun v. Mohun*, 1 E.W. 201. Similarly, a direction that the "surplus money" will be spent in "proper and just acts for my benefit" will fail for uncertainty. *Gocul Nath v. Issur Lochan*, 14 Cal. 292; *Sarat Chandra v. Pratab*, 40 Cal. 232. Cf. *Nandlal v. Harlochand*, 14 Bom. 476; *Bai Shundanbai v. Dady*, 26 Bom., 632. A bequest of money for the purpose of "a building for Hindus exclusively for general purposes to be erected on land which is

"bought" is void for uncertainty. *Chinubhai v. Bai Matskhai*, 84 Bom. L.R. 609 = A.I.R. 1932 Bom. 461 = 188 I.C. 826. A gift will not however fail for uncertainty if the testator himself supplies the measure of the gift. For instance, a bequest of £500 or thereabout does not fail, *Oddie v. Brown*, 4 De G. & J. 179. *Jamunibai v. Khimji*, 14 Bom., 1 (in this case the measure of expenditure was obtained from the expenditure incurred on a former occasion for a similar purpose). In some cases the measure of expenditure was determinable by the Court, and the bequest did not fail in consequence, *Pride v Forks*, 2 Beav. 486. Cf. *Dwarkanath v. Baroda Prosad*, 4 Cal. 443; *Lakshmi Sankar v. Vaijnath*, 6 Bom. 24; but where there is absolutely no clue for ascertainment of the measure or amount of expenditure, the bequest is void: for instance, a direction for spending proper amounts for a bathing ghat or a temple is void on the ground of uncertainty. *Surba Mongola v. Mohendra*, 4 Cal. 503. A gift of one Kani out of two will not fail, the donee being given the option to select his Kani, *Narayana v. Periathambi*, 18 Mad. 460. A direction to trustee that "you are to give my wife and children according to your wishes" is condemnable as too vague, *Kumarsami v. Subbaraya*, 9 Mad. 325. A bequest of land yielding an annual income of a specified amount without specifying the particular fields is not void for uncertainty, *Satyalhumabai v. Murlidhar*, I.L.R. (1944) Nag. 817 = 1944 N.L.J. 408 = A.I.R. 1944 Nag. 377. A suit for such a legacy is maintainable, without instituting an administration suit or a general suit for partition, *Ibid.* In this connection read the Assam case in A.I.R. 1955 Assam, 81 and the English case in (1955) 1 All. E.R. 26.

Gifts to charity not void for uncertainty:—We have already seen that gifts for charitable purposes do not generally fail for uncertainty (see pp 172-78, ante), the reason being that the object of such gifts, consisting mostly of a fluctuating or indeterminate body of persons, is primarily uncertain and that if such gifts could be defeated for uncertainty, gift to charity would be an impossibility, *Nakshetramali Dei v. Brajasundar Das*, 12 Pat. 708 = A.I.R. 1933 Pat. 647 = 146 I.C. 866. Cf. *Morice v. Bishop of Durham*; 9 Ves., 399; *Public Trustee v. Berry*, (1941) 2 All. E.R. 125 (C.A.). Thus a gift of a specific sum for distribution "among poor relatives" (*Monoram Dasi v. Kally Churn*, 32 Cal. 166 = 8 C.W.N. 275), or, "for the maintenance of widows and orphans" (*Prafulla Chandra v. Jogendra*, 1 C.L.J. 605 : 9 C.W.N. 528) was not invalid for uncertainty; see also *Gordhan Das v. Chunnلال*, 80 All., 111. A charitable bequest for the marriage of daughters of the poor is likewise valid, *Bysack v. Bysack*, 4 Cal. 443. The bequest of a sum of money to relieve the distress of the members of Karan families of specified nature and on specified occasions, has been held to be certain and not void, *Nakshetramali Dei v. Brajasundar Das*, *supra*. A direction for the erection of a temple for Shiva at a suitable cost is valid, *Gecool Nath v. Issur Mohan*, 14 Cal. 232; for bequest to a Thakur or an idol, see *Bhupatinath v. Ramlat*, 10 C.L.J. 865; *Rajomoyee v. Troyluck*, 6 C.W.N. 267; if the Thakur is not named, the gift is void, *Phundan v. Pratinidhi Sabha*, 89 All. 793. A bequest for "charitable purposes" as a dharmasala is valid, *Gordhan Das's*

case, *supra*. Similarly, see *Smith v. Massey*, 30 Bom., 500; *Parbati v. Bamburn*, 31 Cal 895; *Benode Behari v. Nishorani*, 52 I.A. 198; 83 Cal. 180; 9 C.W.N. 561. So is a gift for furtherance of psychological healing, *Osmand, In re* (1944) 1 All. E.R. 262 (O.A.). A direction to spend the income for feeding poor indigent Hindus or feeding Brahmins on the day following *Sivaratri* is also valid, *Rajendra Lal v. Raj Coomar*, 34 Cal. 5. Cf *Lakshmi Shankar v. Vaishnath*, 6 Bom. 24; *Shyama Charan v. Sarup*, 17 C.W.N. 89; *Kandaswamy v. Jegendia*, 12 C.L.J. 891; 6 I.C. 141; *Kedur Nath v. Atul Krishna*, 12 C.W.N. 1083; such is the case with a direction for carrying *Sudarvat*, *JumnaDas v. Vullubdas*, 14 Bom. 1; *Moraji v. Nurbai*, 17 Bom., 851; a dedication of property in trust for performance of religious ceremonies is not void for vagueness, *Sayid Ismail v. Hamid Begum*, 6 Punj L.J. 211; Cf. *Profulla v. Jogendra*, 9 C.W.N. 528; but a mere bequest for "dharma" or "dharmath" is void, [*Karsandas v. Purhattam*, 14 P.C. 482; *Moraji v. Nurbai*, 17 Bom., 851; *Denshankar v. Motiram*, 18 Bom. 186], as being too general, [*Vundrabandas v. Cursondas*, 21 Bom. 646; *Narain Das v. Brisjalal*, A.I.R. 1938 Lab. 838=146 I.C. 1019; Cf. *Administrator-General v. Money*, 18 Mad. 448; *Fair v. Muhammad*, 25 I.A. 77; 25 Cal 816, P.C.]. Such is the case (*i.e.* void) with a bequest for *Kar-e-khair*, or a good or charitable act, [*Radhey Shyam v. Radha Lal*, 1 Luck. 654=3 C.W.N. 714=A.I.R. 1927 Quidb. 218=97 I.C. 994]; or for *dharma khairat vigore*, *Mariambi v. Fatmabai*, 31 Bom. L.R. 195=A.I.R. 1929 Bom. 127=116 I.C. 242. A bequest for "pious acts" is void for uncertainty, *Satkari Bhattacharya v. Hazirilal Khanna*, 58 Cal. 1025=194 I.C. 1065. Where a bequest is made for *dharmath*, *dharmasila* and for *sanskrit* education, the bequest so far as it is made for *dharmarth* would be void for uncertainty, *tide supra*; although the bequest for the remaining objects may be valid, still the entire gift would fail, as the valid objects were mixed up with an invalid object and the funds might possibly be applied indiscriminably both for the valid and invalid objects, *Brij Lal v. Narain Das*, 14 Lab. 827; a gift for the creation of scholarships, for the male students of British and Christian parentage is not bad for uncertainty, *Gott. Glazebrook v. University of Leeds*, (1944) 1 All. E.R. 293 (Ch. D.). A bequest to education or for help to the poor or for any other purpose of public service in a named place has also been held to be void for vagueness, *Prava Kuverbai v. Kasumbabai*, I.L.R. (1940) Bom. 761=42 Bom. L.R. 827=A.I.R. 1940 Bom. 982=192 I.C. 481. A trust for works of public utility and helping individuals and families in distress has been held to be void for uncertainty; but a resulting trust may arise in such a case, *Velakola Devi v. Official Trustees of Bengal*, 62 Cal. 1062=39 C.W.N. 1154. A bequest of funds to be used in a good way or in gifts of religious merit or for good purposes or for good religious purposes as the trustees think fit has been likewise considered void, *Dahyabhai v. Chemaniai*, 40 Bom. L.R. 418=A.I.R. 1938 Bom. 841=176 I.C. 962.

As to the instance of a charitable trust not failing for uncertainty of disposition, see *Purniam Das Agarwala v. Gobind Prosad*, 48 C.L.J. 465=61 M.L.J. 6=94 A.L.J. 655=28 Bom. L.R. 917=A.I.R. 1926 P.C. 52=100 I.C. 254 (P.C.). The

Judicial Committee have however held that a bequest in favour of benevolent objects to be selected by the trustee is void of indefiniteness. *Attorney-General of Newzealand v. Newzealand Insurance Co. Ltd.*, 41 C.W.N. 821—(1887) 1 M.L.J. 58—1937 M.W.N. 196—A.I.R. 1937 P.C.S.—166 I.C. 883 (P.C.). Cf. *In re Allan*, (1958) 1 W.L.R. 220—2 All. E.R. 225, applied.

One of void clause, vide notes at p. 168, ante; also (1958) 1 All. E.R. 357.

90. [Suc. S. 77] The description contained in a will of words describing subject refer to property answering description at testator's death. property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

N.B.—This section is applicable to Hindus &c. It is based on sec. 24 of the English Wills Act, 1837 (1 Vic. C 26) under which the rule will equally apply to the object and subject matter of the gift, but under this section, the rule is limited to the subject of the gift.

The Section :—The section lays down that in determining what property is the subject of gift we are to look to its description given in the will and take it as its description at the moment of the testator's death. "We are to construe whatever a man says in his will as if it were made on the day of his death," *Re Portal & Lamb*, 30 Ch. D. 50 (65). Thus, a property will pass by a will as it stands on the date of the testator's death and irrespective of its date of acquisition, see *Everett v. Everett*, 7 Ch. D. 428; *Saxton v. Saxton*, 18 Ch. D. 359; *Russell v. O'Neill*, 19 Ch. D. 432; *Re Gillen's*; *Ingles v. Gillens*, (1909) 1 Ch. 345; *Re Evans*, (1909) 1 Ch. 784; *Re Willis*, (1911) 2 Ch. 658; *Re Clifford Mallam v. Mojsie*, (1912) 1 Ch. 29. A testator gave his personal estate to A and his real estate to B; these estates were respectively taken as they stood on the date of the testator's death, *Chandler v. Poerck*, 15 Ch. D. 499; *Jetendra Kumar v. Nritya Goyal*, 18 C.W.N. 140; but see *Ford v. Ward*, (1912) 1 Ch. 388. The effect of the section is that there is a presumption against intestacy in respect of properties acquired by the testator subsequent to the execution of the will, unless the contrary appears from the will, *Alavindar Gramani v. Danakoti Ammal*, A.I.R. 1927 Mad. 389—99 I.C. 775, and that in the absence of an express limitation, the disposition covers all the properties which the testator owned at the time of his death, *Mamt. Rangoo v. Harisa*, 28 N.L.R. 256—A.I.R. 1932 Nag. 163—141 I.C. 160. The property will include all the incidental rights, profits, dividends The accessory follows following the principle of sec. 8 of the T.P. Act. (IV of the principal. 1882) and the maxim *Accessorius sequitur naturam sui principialis*, (S. Inst. 189—An accessory follows the nature of its principal).

see *Birmingham D. D. B. & Co. v. Ross*, 38 Ch. D. 295; *Re White's Charities*, (1896) 1 Ch. 659.

Limitations to this Rule:—There are two limitations to this rule. In the first place, it applies only to the *subject* of the gift, *vide* notes at p. 176, *supra*; secondly, it applies only when *no contrary intention appears from the will*. Thus, where the testator refers to a leasehold interest in a house at the date of his will; but this leasehold interest was subsequently enlarged at the time of his death; that enlarged interest did not pass, *Re Knight*, 34 C.D. 518. The words "now," "am," "at present," "to-day" and the like will show a *contrary intention* as contemplated by the limitation in the section, and in case of such words, the point of time will be shifted from the date of death to that of the will or some other appointed time. See the following cases, *Slater v. Slater*, (1907) 1 Ch. 665; *Dudley v. Champion*, (1893) 1 Ch. 101; *Gillford v. Pawgs Kick*, 30 Beav. 200; *Lady Langdale v. Briggs*, 8 De G. M. & G. 891. Of late, there has been a tendency in the English Courts to construe terms indicative of the present tense not with reference to the date when the will is made, but to the date on which the testator dies. Cf. *Dickinson v. Dickinson*, 12 Ch. D. 22; *Foxton v. Foxton*, 13 Ch. D. 359; *Wagstaff v. Wagstaff*, L.R. 8 Eq. 229; also 30 Ch. D. 50, *supra*. So such words by themselves may not show an intention that the *after-acquired* property should not pass, *vide Everett v. Everett*, 7 Ch. D., 428; *Re Midland Ry. Co.*, 34 Beav. 525. Cf. *Jitendra Kumar v. Nrity Gopal*, 18 C.W.N. 140. A description of the property as that which the testator "now owns or occupies according to circumstances does not exclude the after-acquired properties, *Mst. Bangoo v. Hant a.*, 28 N.L.R. 255=A.I.R. 1932 Nag. 163=141 I.C. 160. When the bequest was in respect of the testator's share in a business (which was a *third* on the date of will and the *whole* at the time death), his whole interest passed, *Re Russel*, 19 Ch. D. 432. Cf. *Lawes v. Bennet*, 1 Cox. 167; *Re Pyle*, (1895) 1 Ch. 724.

91. [Soc. S. 78] Unless a contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution

Power of appointment
executed by general
bequest.

of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.

N. B.—This section does not apply to Hindus &c. It corresponds to sec. 97 of the English Wills Act, 1837 (1 Vic. C. 26).

Power of Appointment:—*Vide* notes at p. 129, ante. A power is a right given to a person to deal with property, either wholly or partially for the benefit of himself or for the benefit of others. Powers are (1) general or (2) special. The power is general when the person to whom the power is given can exercise it as he pleases; *Abdul Halim v. Saadat Ali*, 1 Luck. c. 783 = A.I.B. 1928 Oudh, 165 = 108 I.C. 817. Thus, a gift is made to A for life and after his death to such person or persons as A shall appoint. Here A possesses a general power of appointment, *Re Weekes's Settlement*, (1897) 1 Ch. 289. Such a general power is also called mere power as distinguished from trust power, which implies that the power is of a special or qualified kind involving some trust confided to the person to whom the power of appointment is given: Thus, if the gift is to the children of A in such shares or in such proportion as A shall appoint, or to such children of A as A (the donee of the power) shall think most deserving. Such power is special and qualified; it is qualified as the power-holder has no absolute right of selection but has to use his discretion within the narrow compass prescribed by the testator. See *Bacon v. Higgs*, 4 Ves. 708; 8 Ves. 501. Such powers are also called trust powers as they imply the reposing of a confidence or trust in the donee that he should faithfully carry out the work of selection left to him from among the persons whom the testator had intended to benefit. Compare also *Longmore v. Bacom*, 7 Ves. 124 (128); *Wilson v. Duguid*, 24 Ch. D. 244. A general power may be well exercised by a will executed previously to the creation of the power, and that too by a mere residuary gift, *Dinshaw v. Sorabji*, 31 Bom 478. Cf. *Bai Motivahu v. Bai Mamubas*, 19 Bom. 647; *Albert v. Administrator-General*, (1926) M.W.N. 808. When the power of appointment will not be considered uncertain, (1955) 1 All. I.R. 26. As to how far power to adopt conferred by will takes effect like a power of appointment, read the notes at p. 129, ante.

Effect of Appointment:—The effect of appointment is that the property becomes assets available for the payments of the appointor's debts, *Beypus v. Lawdley*, (1903) A.C. 411.

Application of the Section:—This section says that a bequest of the property of the testator will include any property over which he has a general power of appointment; or in other words, the property over which the testator has only a general power will rank as his own property. This section, it should be noticed, is confined only to general powers, (*vide Re Powell's Trust*, 18 W. R. 228 : 29 L.J. Ch. 188), and does not contemplate the special or trust power which implies a faithful execution of a task according to one's discretion and ability within a narrow compass chalked out by the grantor of the power, *Clover v. Awdry*, 12 Beav. 604; *Holyland v. Lewis*, 20 Ch. D. 266; *Russel v. Russel*, 12 Jr. Ch. 887; *Boyes v. Book*, L.R. 14 Ch. D. 59; *Re Powell's Trust*, 89 L.J. Ch. 188; *Re Byron's Settlement*, (1891) 3 Ch. 474.

Limitation to the Section :—This section applies only if no *contrary intention appears by the will*. There is no contrary intention within the meaning of this section unless the will contains something to negative the idea that the property under power is to class with the testator's other properties, *Scroven v. Sandem*, 2 J. & H. 743. For the burden of proof of "contrary intention", see (1957) 3 All. E.R. 465. Under the English law a codicil cannot be read with the will for the purpose of showing that a *contrary intention appears by the will*, *Maddick v. Marks*, L.R. 14 Ch. D. 422 ; but it seems that having regard to the present definition of "codicil" in section 2 (b), this English rule no longer applies to this country.

92. [Suc. S. 79] Where property is bequeathed to or for the benefit of certain objects as a specified person

Implied gift to objects of power in default of appointment.

may appoint or for the benefit of certain objects in such proportions as a specified person may appoint,

and the will does not provide for the event of no appointment being made ; if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares.

Illustration.

A, by his will, bequeathes a fund to his wife, for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children.

N.B.—This section does not apply to Hindus &c.

Application of the Section :—This section deals with *special power of appointment*. As to what is a *special power*, *vide* notes at p. 178, *ante*. It provides that where a gift is made for the benefit of certain persons or for their benefit in such proportions as the holder of the power shall appoint, in default of such appointment, the bequest *impliedly* belongs in equal shares to all the persons for whose benefit the power is granted, *Rouleye v. Dorris*, 2 Ves. 957. This section applies only in *default of appointment*, *Ibid*. It seems that it also applies to the case of *improper exercise* of the power of appointment, *Ibid*. Or in other words, if the real or personal estate be given to, or for the benefit of, such of specified persons as A shall appoint, or to or for the benefit of certain objects in such proportion as A shall appoint, and there is no provision for any gift in *default of appointment*, if the power of selection or distribution be not exercised, the gift is not void for uncertainty, but the property becomes divisible among all the objects of the power in equal shares, see *Brown v. Higgs*, 4 Ves. 708 : 8 Ves. 661. Also *vide* the cases cited under the heading "Power of Appointment" at p. 178, *ante*. A power was

given "to the use of such of the issues only of C. and J. (daughters) as they should respectively appoint, such appointment to take effect of their own respective moiety only and not that of the other of them," held, each daughter took half the property with a power to appoint, *Byramji v. Ratnagar*, 18 Bom. 1.

Default of exercise of Power:—If the power is exercised, the gift follows the course of appointment, but when the power is not exercised, this section makes provision for equal distribution among all the objects of the power. Whether the power has been executed as intended is a question of construction, *Mills v. Mills*, 84 Ch. D. 186; *Jack v. Jack*, (1899) 1 Ch. 374. In order to exercise a special power, there must be a sufficient expression or indication of intention in the will in that behalf, *Chapman v. Andrew*, (1913) Ch D. 510. A power of appointment is not properly executed by the fact of execution of a joint will by husband and wife, *Fehrzen v. Simpson*, 4 Cal. 614; vide also other cases on this subject; *Kent v. Kent*, (1902) P. 677; *Turnbull v. Haxes*, (1901) 2 Ch. 529; *Wilson v. Duguid*, L.R. 24 Ch. D. 244; *Cosy v. Morel*, (1955) 2 All. E.R. 630. Cf. also *Javnbai v. Kablibai*, 16 Bom., 492. As to the effect of non-exercise of the power of adoption read the notes at p. 129, ante.

Equal shares:—In absence of appointment the objects of the power take in equal shares, i.e. *per capita*, and as tenants in common, *Wilson v. Duguid*, L.R. 24 Ch. D. 244; *Casterton v. Sutherland*, 9 Ves., 446. As to the point of time with reference to which the class of such objects (of power) is to be determined, see *Lambert v. Thwaites*, L.R. 2 Eq. 165; *Brown v. Higgs*, *supra*.

93. [Suc. S. 80] Where a bequest is made to the "heirs" or "right heirs" or "relations" or "nearest relations" or "family" or "kindred" or "nearest of kin" or "next-of-kin" of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustrations.

(i) A leaves his property "to my own nearest relations." The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.

(ii) A bequeaths 10,000 rupees "to B for his life and, after the death of B, to my own right heirs." The legacy after B's death belongs to those who would be

entitled to it if it had formed part of A's unbequeathed property.

(iii) A leaves his property to B ; but if B dies before him, to B's next-of-kin ; B dies before A ; the property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(iv) A leaves 10,000 rupees "to B for his life, and after his decease to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

N. B — This section does not apply to Hindus etc.

Bequest to "Heirs" &c, without qualifying terms :— Such a bequest takes effect as in the case of intestacy leaving assets for payment of debts apart from the subject matter of the bequest. For the meaning of the term "Heirs" and the various kinds of them, see *Wingfield v. Wingfield*, 9 Ch. D. 668 ; *Keay v. Boulton*, 25 O. D. 212 ; *Powell v. Boggis*, 35 Beav. 535 ; "Right heir" are the same thing as "heirs-at-law." Where succession is limited to "direct lineal heirs", both male and female heirs will be included in the grant, *Mir Safdar Ali v. Mirza Maksud Ali*, 34 C.W.N. 208 (P.C.). For "relations," see *Baynor v. Murray*, 3 Bro. C.C. 284. Relations primarily denote legitimate and blood relations, *Seale Hayne v. Jodrell*, (1891) A.O. 304 ; *Re Jodrell*, 44 C.D. 590. No illegitimate relations or those by marriage will be excluded, *Harvey v. Harvey*, 5 Beav. 194 ; *Re Wood*, (1902) 2 Ch. 542 ; *Warsley v. Johnson*, 3 Atk. 788, unless they are included by express provision, Cf. *Re Jodrell's case, supra*. Cf. *Re Corstellis*, (1906) 2 Ch. 516 ; *Leoland v. Leoland*, (1906) 1 Ch. 542 ; *Walter v. Mandes*, 19 Ves. 424. For "family" see *Green v. Mursden*, 1 Drew, 65 ; *Re Terry's Will*, 19 Beav. 580 ; *Barnes v. Patch*, 8 Ves. 604 ; *Harlond v. Trigg*, 1 Bro. O.C. 142. For "next-of-kin" vide notes at p. 42, ante ; also *Davies v. Edwards*, (1910) 2 Ch 74 ; *Withy v. Mangles* 10 Cl. & F. 215 ; *Re Gray's Settlement*, (1896) 2 Ch. 802 ; The word "family" is elastic and capable of different interpretations, *Gnanendra Nath v. Surendra Nath*, 24 C.W.N. 1026, P.C. In this case the meaning of the term was not extended to include people other than those existing when the testator died. Sometimes, it is interpreted to mean only "the testator's descendants and their wives living at the time of his death. Cf. 4 C.W.N. 671. In *Khetto Mohun v. Gunga Narasim*, 4 C.W.N. 671 (*supra*), the term was interpreted to mean the "relations of the testator whether connected by marriage or blood, and living at the time of the testator's death and forming part of his household. Read the notes under the heading, "Family", post. As to the nature of the estate taken by the devisees, when the gift is to "A and his sons", A and his sons being members of a joint family at the time of the devise, *Janakiram Chetty v. Nagamony Mudaliar*, 49 Mad. 98=50 M.L.J. 418=A.I.R. 1926 Mad. 273=93 I.C. 662.

Next-of-kin :—*Vide notes supra* and at p. 42, ante. The term will not include a widow, *Kilner v. Leach*, 10 B., 362; *Re Fitzgerald*, 38 L.J. Ch., 662; nor a husband, *Milne v. Gilbert*, 2 D. M. & G. 715; 5 D. M. & G. 510.

Family :—*Vide notes at p. 42, ante*; also *supra*. Where a testator by his will provided for the maintenance of the members of his family, the term "family" would mean the testator's descendants and their wives living at the time of the testator's death, *Golapmoni v. Hrishikesh*, 44 C.W.N. 597. The word "bangsa" in a Hindu will means family and not merely lineal descendants, *Prasaddas Pal v. Jagannath Pal*, 60 Cal. 638=37 C. W. N. 181=A. I. R. 1933 Cal. 519=144 I. C. 894.

Application of the Section :—The section says that an independent bequest to such class of persons as "heirs", "next-of-kin" etc., without any qualifying terms, is to be distributed as if the testator had died intestate. Three points should be noticed in connection with this section, (1) the designated class forms the direct and independent object of the bequest, (2) the class, i.e. heirs, next-of-kin etc. is specified without any qualifying terms, (3) the enumeration in the section is not exhaustive but only illustrative. The words "qualifying terms" in this section refer to the heirs and not to the bequest, *Dinbas v. Nusserwanji*, 17 Bom. L.R. 182; 28 I.C. 461. Comp. *Aladi Begam v. Mahomed Khalil Khan*, 6 Luck, 282=7 O.W.N. 1010=A.I.R. 1930 Oudh, 481=132 I.C. 753.

Without Qualifying Terms :—Heirs, next-of-kin etc. without any qualifying terms mean such heirs or next-of-kin as would be entitled under the statute, see *Wingfield*, 9 Ch. D. 658; *Re Thompson's Trust*, 9 Ch. D. 607; *Stunnand v. Burnt*, 52 L.J. Ch., 554; Cf. *Keay v. Boulton*, *supra*. The relations without enumeration would likewise take as in the case of intestacy, *Tiffin v. Longman*, 15 Beav., 276; *Fielden v. Ashworth*, 20 Eq. 410; all the above persons would take *per capita* or *per stirpes* according as the law of intestate succession provides, *vide* the cases cited above. The effect of the qualifying terms is to widen or narrow down the compass of the classes of persons specified in this section. Cf. *Pestonji Dhans v. Khussed Bai*, 7 Bom. L.R. 207.

94. [Suc. S. 81] Where a bequest is made to the "representatives" or "legal representatives" or "personal representatives" or "executors or administrators"

Bequest to "representatives" etc., of particular person.

of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it.

Illustration.

A bequest is made to the "legal representatives" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and will apply it in the first place to the discharge of such part of A's debts as may remain unpaid: if there be any surplus, B will pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.

N. B. - This section does not apply to Hindus &c.

The Section :—It is analogous to the preceding section and its principle is best explained by the illustration appended to the section.

Representatives, etc. :—These expressions in the absence of qualifying terms ordinarily mean executors, administrators, *vide Re Crawford's Trust*, 2 Drew, 280; *Re Ware Cumberlege*, 45 Ch D 269; *Leak v. Macdowall*, 48 Beav. 238. But they may be so extended as to include next-of-kin, *Re Hornr*, 37 Ch D. 696; or descendants, *Atherton v. Crowther*, 19 Beav., 448. See also *Re Valdry's Trust*, 40 Ch. D. 159, in which the representative in question was the executor.

95. [Suc. S. 82] Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

N B —This section is applicable to Hindus &c. It corresponds to sec. 28 of the English Wills Act, 1837 (1 Vic., C. 26). For general interpretation of the section, read (1958) S.C.J. 520 = A.I.R. 1958 S.C. 804.

Bequest without Limitation :—A bequest without limitation passes the entire interest of the testator unless a contrary intention appears in the will itself. *Beny v. Rawlinson*, 29 Beav., 88; also 10 All. 525; *Sureshy Dossee v. Poorno Chandra*, 4 W.R. (O.H.) 50; also *Navalchand v. Manekchand*, 28 Bom.L.R. 450; 62 I.O. 68; *Sheo Shankar v. Melhana Kuar*, 5 O.L.J. 606: 48 I.C. 177; *Martin v. Hirday Ram*, 44 All. 897: 20 A.L.J. 266: 66 I.O. 869; *Tagore v. Tagore*, 9 B.L.R. 377: 18 W.R. 359; *Administrator-General v. White*, 13 Mad. 879; *Anandrao v. Administrator-General*, 20 Bom. 450. A bequest without any restrictions as to the time and mode of enjoyment is an absolute one. *Abadi Begam v. Mahomed Khalil Khan*, 6 Luck. 282 = 7 O.W.N. 1010 = A.I.R. 1980 Oudh 481 = 192 I.C. 753. A gift with the words

"in case my son dies before attaining proper age, all my Absolute estate . . . estate should be taken possession of by my brother" was construed to be an absolute gift. *Olkaymoney v. Nilmoney* Mawlik, 15 Cal. 282; Likewise, the words "shall possess as owner and possession"

were held to convey an absolute interest. *Gobinda Chandra v. Benode Chandra*, 12 O.W.N. 44; *Oj. Saroda Sundari v. Kristo Jibon*, 5 C.W.N. 300. The words, "I leave in charge of" in a will have been construed to mean "I devise absolutely to". *Abibn Ali v. Alhajimama*, 76 C.L.J. 495=A.I.R. 1942 P.C. 89=208 I.C. (P.C.). Grant of power of alienation will imply an absolute interest. *Jogeswar Naram v. Ham Chand*, 29 I.A. 37: 29 Cal 670; *Advocate-General v. Hormusji*, 29 Bom., 875; *Irvine v. Sullivan*, L.R. 8 Eq. 678; *Cowiskay v. Hanbury*, 9 C.W.N. xviii (98). A gift for life coupled with a general power of appointment may sometimes be taken to indicate the gift of an absolute estate. *Rameshar Baksh v. Balraj Kuar*, 9 O.W.N. 660=A.I.R. 1932 Oudh, 327. A life estate with an unrestricted power of disposal is a contradiction in terms; therefore, such

an unrestricted power is construed as implying an absolute estate, *Govindbhai v. Dahyabhai*, 98 Bom. L.R. 175=A.I.R. 1936 Bom. 201=169 I.C. 632. Where an absolute estate was granted, grant of an ulterior disposition is void, *Rajeshwari v. Mathura*, 69 I.C. 348: 24 O.C. 187, as being repugnant to the estate already created, *Jagdeo Singh v. Deputy Commissioner, Patialgarh*, 2 Luck 507=13 O.L.J. 762=A.I.R. 1926 Oudh, 491=96 I.O. 47; *Rameshar Baksh v. Balraj Kuar*, 9 O.W.N. 660=A.I.R. 1932 Oudh, 327 [earlier words conferred on absolute estate, the latter clause was a surplusage]. Read the F.B. decision of the Oudh Court in *Jagmohan Singh v. Sheoraj Kuar*, 8 Luck. 19=4 O.W.N. 1126=A.I.R. 1928 Oudh, 49=106 I.C. 593 (F.B.); also *Nand Kishore Lal v. Pasupathi Nath*, 7 Pat. 396=A.I.R. 1928 Pat. 348 (N.B. The rule in Shelley's case does not apply to the construction of wills in India); *Ram Saran v. Ganga Devi*, 9 Lah. L.J. 32=A.I.R. 1927 Lah. 888=109 I.C. 830—following 6 Lah. L.J. 413; *Surish Chandra Pakht v. Lilit Mohan Dutta*, 12 C.L.J. 816=20 C.W.N. 463=81 I.C. 405—relied on in *Haradhona Ghose v. Dasaratha Mukhopadhyaya*, 67 C.I.J. 237=A.I.R. 1939 Cal. 388 [absolute interest not cut down by subsequent words, in absence of contrary intention]; *Sansar Chand v. Durga Das*, 1933 A.L.J. 1436=A.I.R. 1934 All. 98=149 I.C. 648. Comp. however, *Swami Dayal v. Ramadhar*, A.I.R. 1931 Oudh, 358=134 I.C. 865. Appointment of an executor is not inconsistent with the giving of an absolute estate. *Kanhaia Lall v. Hira Bibi*, 15 Pat. 161=A.I.R. 1936 Pat. 828=163 I.C. 940; *Muhammad Ziaullah v. Rasiq Mohammad*, 1939 O.W.N. 581=A.I.R. 1939 Oudh, 213=182 I.C. 190. Read the notes and cases under the heading, "Gift over on a contingency" under secs. 124 and 181, post. A testator, after granting an absolute estate with power of alienation, provided for a gift over of "what may be left of the estate" at the time of the death of the previous legatee, and the Court held that the gift over was void not only for repugnancy but also for uncertainty. *Rameshar Baksh v. Balraj Kuar*, *supra*; see also *Parkash v. Chander Parkash*, 98 P.L.R. 85=A.I.R. 1939 Lah. 215=188 I.C. 365. Where the dominant intention of the testator is to make an ulterior disposition, mere use of words ordinarily indicative of absolute interest, will not convert what is intended as a life-estate into an

absolute estate, and in such a case no question of curtailment of an absolute interest will arise, *Khajeh Habibullah v. Ananga Mohan Roy*, I.L.R. (1942) 2 Cal. 363 = 5 O.L.J. 279 = 46 C.W.N. 719 = A.I.R. 1942 Cal., 571 = 202 I.C. 90. It may sometimes happen that by reason of subsequent development of events, the devised property takes the same course of succession, whether the prior interest be an absolute interest or a limited interest, and in such a case it may not be necessary for the Court to make a final pronouncement on the nature of the interest given, *Sanjeevappa v. Nimba Jetty*, 6 Mys. L.J. 379. Creation of successive life-estates does not necessarily take away from the absolute character of the devise, *Martin v. Harday Ram*, 44 All., 897 : 20 A.L.J. 266 : A.I.R. 1922 All. 120 : 66 I.C. 869 ; but see *Harendra Chandra v. Basanta Kumar*, 22 C.W.N. 689 : 43 I.C. 991. Where the words clearly show an intention to convey an absolute interest, no presumption can be raised in favour of a restricted gift, *Samba Siva v. Venkataswara*, 91 Mad. 179. The intention of the testator is after all the real test as to what interest has been conferred *Mahomed Ali v. Nisar Ali*, 1 Luck. 592 = A.I.R. 1928 Oudh, 67 = 109 I.C. 835 ; as to the effect of the use of certain technical words, and words of inheritance, *vide notes infra*. It has been held that a bequest of "money" passes the whole of the testator's personal estate, *Cheda Lal v. Gobind Ram*, 30 All. 455. Read also the notes at p. 147, ante. A direction "to remain in possession just like myself" to a widow is a limitation and passes only a life-estate, *Brijlal v. Suraj Baksham*, 39 I.A. 150 : 84 All. 405 : 16 C.W.N. 745 : 16 C.L.J. 47, P.C. Cf. also *Radha Prosad v. Ranee Moni*, 35 I.A. 118 : 35 Cal. 896 ; 12 C.W.N. Bequest with a Gift over : Limited Interest. 729 (P.C.) ; *Mahomed Ali Khan v. Nisar Ali Khan*, 1 Luck. C. 592, *supra*. When there is a valid gift over, the devise is generally of a limited interest, *Motilal v. Administrator-General*, 85 Cal. 279 ; *Moung Po v. Na;ean*, 5 Bur. L.T. 87 : 15 I.C. 355 ; *Mafat Lal v. Kanhiyu Lal*, 17 Bom. L.R. 705 : 30 I.C. 915. Cf. 29 Cal. 699 : 6 C.W.N. 721 ; 19 Bom. 401 ; 12 Bom. 185 ; 13 Bom. 463 ; 16 Cal. 883 (P.C.) ; 22 Bom. 883 : 2 C.W.N. 417 ; *Damodara Moothan v. Ammu Amma*, (1943) 2 M.L.J. 332 = 1943 M.W.N. 554 = A.I.R. 1944 Mad. 22 = 211 I.C. 238 ; *Govindbhai v. Dahyabhai*, 88 Bom. L.R. 175 = A.I.R. 1936 Bom. 201 = 163 I.C. 632. A valid gift over with restriction on enjoyment of the income, creates only a life-estate, *Radha Krishna Chettiar v. Narayanswami Aiyar* ; 1936 M.W.N. 1154 = 71 M.L.J. 829 = A.I.R. 1937 Mad. 153 = 166 I.C. 727. Simply because the gift is from the husband to the wife, that does not show that the gift was not intended to be an absolute one, *Indra v. Bijia*, 21 A.L.J. 125 : 27 C.W.N. 221 (P.C.). This was so held in an earlier case before the Judicial Committee, *Shamsool Hooda v. Shewakram*, 2 I.A. 7, *infra* ; see also *Veditha Venkanna Nakka*, I.L.R. (1953) Mad. 1235 = A.I.R. 1954 Mad. 186 ; *Pulliah Chetty v. Varadabagulu*, 81 Mad. 474 ; *Saroda Sundari v. Kristo Jiban*, 5 C.W.N. 300 ; *Bhaba Tarini v. Peary Lal*, 24 Cal., 647 ; *Bhujanga v. Ramayamma*, 7 Mad. 387 ; *Mohendra v. Rakhal*, 17 O.L.J. 630 ; but it has been held in *Koonjbehari v. Prem Chandra*, 5 Cal. 684 that in absence of express terms giving a heritable right or power of alienation.

Mt. Mehtab Kaur, A.I.R. 1933 Lah. 661=85 P.L.R. 244=147 I.C. 968; likewise, creation of successive estates may imply a contrary intention, *Harendra Chandra v. Basanta Kumar*, 22 C.W.N. 689: 49 I.C. 991; Cf. *Darshan Singh v. Wali Khan*, 27 A.L.J. 274=A.I.R. 1929 All. 102=116 I.C. 30; contra, *Marten v. Hinde Ram*, 44 All. 397: 20 A.I.J. 266: 66 I.C. 869. Contrary intention may be inferred from other words of limitation as well, *Haywood v. Lingwood*, 19 Ch. D. 470; *Maung Pu v. Napean*, 15 I.C. 365 (Bur.); see also *Punchoomoney v. Treylucko Mohiney*, 10 Cal. 342; *Radha Prosad v. Ranimoni*, 35 I.A. 118: 35 Cal. 896: 12 C.W.N. 729: 8 C.L.J. 48. P.C., *Amrikacharan v. Sasstara*, 22 C.L.J. 61; 80 I.C. 668; *Yorke v. Tribhubandas*, 29 Bom., 401; *Probodh Lal v. Harish Chandra*, 9 C.W.N. 309; thus, a devise of mere use and occupation is indicative of an intention to limit the interest of the donee, *Re Coward*, 57 L.T. p. 285. All words of limitation do not however imply curtailment of absolute interest; for instances, see *Crollly v. Crollly* (1910) 1 Ch. 219; *Wisden v. Wisden*, 2 Sim. & Giff. 396; *Konkoya Lall v. Hira Bibi*, 15 Pat. 161=A.I.R. 1936 Pat. 323=163 I.C. 940. According to an Allahabad case, a devise of an absolute interest with a limited restriction on the donee's power of alienation *inter vivos* is not cut down, if the donee retains the property (that is, does not alienate during his life-time) and passes on the donee's death as his absolute property, *In re Twalling*, 1935 A.L.J. 1207. The Oudh Court also has held that restriction on one form of alienation (that is, on power of making a testamentary gift or bequest) without any restriction on other forms of transfer, such as sale, mortgage etc. does not cut down an absolute interest, *Ramanuj Bhan v. Manraj Kuer*, 10 Luck. 60=1935 O.W.N. 68=A.I.R. 1935 Oudh, 198=153 I.C. 878. Any limitation or restriction should not also be inferred from the fact that a special power is given to a donee to appoint generally to his children, *Brock v. Brock*, 2 Sim. & Giff. 260. As to whether devise of rents and profits &c., imports any limitation, see *Mannox v. Greener*, L.R. 14 Eq. 456; *Martin v. Martin*, 1892 W.N. (Eng.) 120. The Judicial Committee have held that a devise

Void Limitation.

of the rent of land for an indefinite time is equivalent to the devise of the land itself, *Ahba Ali v. Alhaji Mama*, 76 C.L.J. 495=A.I.R. 1942 P.C. 69=203 I.C. 561 (P.C.). When the limitation is invalid in law, it does not affect the absolute character of the gift, *Suresh Chandra v. Laist Mohan*, 12 C.L.J. 316=20 C.W.N. 463: 81 I.C. 405. It is for this reason that the decided cases have gone the length of invalidating a gift over after the creation of an absolute estate; read the notes at p. 184, *ante*; and it has been maintained that where the intention of the testator is to grant an absolute interest, mere use of restrictive or qualifying conditions (through inadvertence or want of skill and so forth), does not limit the donee's powers, *Amarendra Nath v. Suwadhani*, 14 C.W.N. 458; *Jagdeo Singh v. Deputy Commissioner, Partabganj*, A.I.R. 1926 Oudh, 431=96 I.C. 47. For instances of limitations that do not restrict the gift, see *Sooryadu v. Hanumayya*, 19 M.L.J. 384; *Annie Wilson v. Oakes*, 31 Mad. 283; *Lala Manni v. Raja Partab*, 67 I.C. 8: 1922 Oudh, 22; but see *Somasundara v. Gunga Bissen*, 28 Mad., 386, in which a subsequent modification of the previous interest was allowed to prevail; also

Surendra Nath v. Sarojbandhu, 26 C.W.N. 893 : 70 I.C. 923. See also *Navalchand v. Manekchand*, 23 Bom. L.R. 450 : 62 I.C. 98. A restriction on the power of alienation of an absolute donee, is a void restriction, read the notes under sec. 138, post.

Provision for Maintenance :—Where the testator directed his son to pay the plaintiff maintenance, Held that the direction did not create a charge on the inheritance, but simply imposed an obligation to the son to make a payment for maintenance. *Alamelu Ammal v. Raja*, A.I.R. 1926 Mad 1167. Where the will provided for the maintenance of the members of his family the executrix, his widow, so long as those members resided with her under the old family roof, the Court held the provision to be operative so long as the condition was fulfilled. *Gopalmoni v. Hrishikesh*, 44 C.W.N. 597.

Provision for payment of annuity :—There is a divergence of Judicial opinion whether such a provision is repugnant to the creation of an absolute estate; read the notes under the heading "Void Restrictions" under sec. 138, post.

Devise to heir—Effect :—When a bequest is made to a son, the bequeathed property goes to him by devise and not by descent, *Jugmohandas v. Mangaldas*, 10 Bom., 528 (criticised in *Ahmedbhoy v. Dinsha*, 11 Bom. L.R. 646); *Janks v. Bhairon*, 19 All. 133; so, such a property is not ancestral property in the hands of the son, but is his self-acquired property. Cf. *Parsotam Rao v. Janki Bai*, 29 All., 954. The position may be different under the Mitakshara Law under which a father's power of alienation over the family property is very limited, see *Nagalingam Pillai v. Rama Chandra*, 24 Mad. 429; compare also *Bhangbuti Dasee v. Chowdry*, 2 I.A. 256 : 1 Cal. 104; *Gooroodas v. Sarat Chandra*, 6 C.W.N. 721; *Anandrao v. Administrator-General* 20 Bom., 450; *Shumsool Huda v. Shewukram*, 2 I.A. 7 : 22 W.R. 409 (P.C.)—approved in *Mohan Singh v. Mt. Gour Devi*, A.I.R. 1931 Lab. 728 — 131 I.C. 738 When the sons take by devise and not by descent, their mother does not get any share on partition among them, *Debendra v. Brojendra*, 17 Cal. 886; *Poorendra v. Hemangini*, 36 Cal. 75 ; 12 C.W.N. 1002.

Devise to limited owner, how construed :—Read, 1954 S.C.J. 557 = A.I.R. 1954 S.C. 345, cited at p. 186. Comp. A.I.R. 1954 All. 715.

96. [Suc. S. 83] Where property is bequeathed to a person with a bequest in the alternative to another person Bequest in alternative. or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of

persons named in the second branch of the alternative shall take the legacy.

Illustrations.

(i) A bequest is made to A or to B. A survives the testator. B takes nothing.

(ii) A bequest is made to A or to B. A dies after the date of the will, and before the testator. The legacy goes to B.

(iii) A bequest is made to A or to B. A is dead at the date of the will. The legacy goes to B.

(iv) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.

(v) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator, the bequest to A's nearest of kin takes effect.

(vi) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator. B dies in A's lifetime. Upon A's death the bequest to the heirs of B takes effect.

(vii) Property is bequeathed to A for life, and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death the bequest to the heirs of B takes effect.

N. B.—This section applies to Hindus &c.

Object of the Section:—The object of the section is to guard against a lapse in the event of the legatee's death before the testator. So, if one legatee predeceases the testator, other persons may be substituted in his place. Cf. *Ive v. King*, 16 Beav. 46; *Gittings v. McDermott*, 2 My. & K. 69.

Bequest in the alternative:—The essence of an alternative bequest is that the legacy takes effect first with the first alternative, and only when that fails, it goes to the other alternative branch. Thus, where there is a gift over in default of a particular person, it will be an alternative gift, see *Javerbas v. Zablitai*, 15 Bom. 26; 16 Bom. 492, and will take effect only according to the above principle. So, it follows that the substituted donee must survive the first legatee, *Wormold v. Wooley*, (1903) 2 Ch. 206. Thus, a testator, after a life interest to his son devised the

residue in favour of the children of that son or failing them, to the granddaughters through his daughter; at the time of the testator's death there were no grandchildren by his son, but only two daughter's daughters; the alternative bequest to these granddaughters was given effect to, *Somasundara v. Gunga Bissen*, 28 Mad. 386; an original alternative gift to issue does not fail by reason of the parent's death, before the legacy takes effect, but if such a parent be an intermediate life-tenant, he may defeat the alternative gift by surviving for a long time. Cf. *McKay v. McKay*, (1901) I.R. 109; *Aptin v. Stone*, (1904) 1 Ch. 543; thus in *Somasundara's* case, *supra*, the grandchildren took notwithstanding the decease of their parent. Where a legacy was given to P during her life-time and after her to P's sons or son's children and the son's were alive after P, the gift to the children would fail. *Rizu Chattier v. Shanmugam Pillai*, (1940) 2 M.L.J. 876=1940 M.W.N. 899=62 L.W. 279=A.I.R. 1941 Mad., 245. For other cases on the subject, *vide. Gorringe v. Mahls'edt*, (1907) A.C. 225; *Re Cope*, (1908) 2 Ch. 1; *Re Lambert*, (1908), 2 Ch. 117; *Re Metcalf*, (1909) 1 Ch. 424. For an alternative gift subject to the power of appointment, see *Javerbia's* case, *supra*; *Brown v. Higgs*, 8 Ves., 561; *Wilson v. Duguid*, 24 Ch. D. 244. Although successive life estates in favour of unborn persons and all estates thereafter are not valid, yet where the bequest is in the alternative to that in favour of an unborn person, who does not come into existence when the previous estate is exhausted, is not bad, *Darshan Singh v. Wali Khan*, 27 A.L.J. 274=A.I.R. 1929 All. 102=116 I.C. 30.

Limitation to the Rule:—As before, this rule is also subject to the limitation, that its application can be excluded by evincing manifest intention to the contrary.

97. [Suc. S. 84] Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

Illustrations.

(i) A bequest is made—

- to A and his children,
- to A and his children by his present wife,
- to A and his heirs,
- to A and the heirs of his body,
- to A and the heirs male of his body,
- to A and the heirs female of his body,
- to A and his issue,

to A and his family,
 to A and his descendants,
 to A and his representatives,
 to A and his personal representatives,
 to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(ii) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(iii) A bequest is made to A for life and after his death to his issue. At the death of A the property belongs in equal shares to all persons who then answer the description of issue of A.

N.B.—This section has not been made applicable to the Hindus &c., as it has been thought inexpedient to apply this artificial rule of construction of English law, which this section embodies, to them, read *Krishnadas Tulsi das v. Dwarkanadas Kaliandas*, I.L.R. (1937) Bom. 679 = 38 Bom. L.R. 829 = A.I.R. 1936 Bom. 459 = 166 I.C. 172. But the Madras Court has held that although the section is inapplicable to the Hindus still the general principle embodied in it may be applied to them, if the testator had not expressly desired otherwise, *Damodara Moothan v. Ammu Anima*, (1943) 2 M.L.J. 382 = 1943 M.W.N. 554(2) = A.I.R. 1944 Mad. 22 = 211 I.C. 238—relied on in A.I.R. 1954 Andhra 2.

Bequest to a person with a class added:—The section says that if a gift is made to a particular person and words are added to denote a particular class, without meaning the class as direct objects of the gift, then the particular person is entitled to the *whole interest* of the testator. See the cases in illus. (1) *supra*, but where the superadded words are brothers, sisters and cousins &c. (as in illus ii), the class is indicated as objects of a direct gift, and the rule of this section will not apply and the particular person instead of taking the *whole interest alone* shares it jointly, with the members of the class. The following English cases, may be consulted in this connection, *Mason v. Clarke*, 17 Beav. 126; *Ward v. Grey*, 26 Beav. 485; *Campbell v. Bourskell*, 27 Beav. 325; but see *Skinner v. Durga Prasad* 31 All., 239, in which a gift (not subject to the Succession Act) "to my eldest son and to his lawful male children" was held not to confer an absolute interest; also see *Richard Ross v. Kunwir Naunlal*, 40 I.A. 105 : 36 All. 211 : 11 A.L.J. 494 : 17 C.W.N. 853 ; 17 C.L.J. 555 : 25 M.L.J. 111 : 19 I.C. 267, (P.C.), and *Administrator-General v. Money*, 15 Mad. 448. In a recent case an Indian Christian by his will gave his property "to his daughter and her children" and the Court held that the daughter took an absolute estate, the case falling within illus. (1) of this

section, *Agnes Harriet v. Murray*, 11 O.L.J. 469 : 79 I.C. 1026 : A.I.R. 1925 Oudh, 24. The words of the section are wide enough to cover the cases of periodical payments and annuities payable under a will, *Seth Sam v. Fela Hari*, 51 C.W.N. 340.

Contrary Intention:—The application of the section may be excluded by evincing an express intention to the contrary see illus. (iii); for instance, there may be indication in the context that the superadded class was intended to be directly benefited or that the bequest to the particular person was intended to be of a limited character, see *Law v. Thorp*, 27 L.J. Chan. 649 ; *Goldney v. Crabb*, 19 Beav. 398 : *Knight v. Ellis*, 2 Bro. C.C. 670 ; *Ex parte Wynch*, 6 De M. & G. 186. In a Calcutta case, a bequest to the daughters "and their respective sons" was construed as conferring an absolute interest upon the daughters, *Raneemoney v. Premmoney*, 9 C.W.N. 1033 (1046); *Radha Prosad Mullick v. Raneemoney*, 33 Cal. 947; also *Agnes Harriet's case*, *supra*, and 35 I.A. 118 : 35 Cal. 896 : 12 C.W.N. 729 : 8 O.L.J. 48, (P.C.) ; but see *Skinner v. Durga Prosad*, *supra*, in which the words "his lawful male children" were construed as mere words of limitation, *vide* 17 O.L.J. 555 (*supra*). The Judicial Committee have ruled that the use of the words, "male heirs" in a will do not import any limitation. Under this section, in the absence of any indication of a contrary intention, such an expression is of no much effect, *Dadubhoy Framji Ouma v. Cowsaji Dorabji Panday*, A.I.R. 1926 P.C. 306, P.C.—94 I.C. 535 (P.C.).

98. [Suc. S. 85] Where a bequest is made to a class of persons
Bequest to class of persons under general description only, no one to whom
the words of the description are not in their ordinary sense applicable shall take the legacy.

N. B.—This section applies to Hindus etc.

Bequest to a Class:—A "class" means a group of persons designated by a common name, and when the bequest is made with reference to the group name, it is called a gift to a class. "A gift is said to be to a class of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula", *Pearks v. Moseley*, L.R. 5 Ap. Cas. 714 ; *Leake v. Robinson*, 2 Mer. 363 ; *Smith v. Smith*, 29 S.L.R. 374 = A.I.R. 1936 Sind, 168—164 I.C. 839. It is the very essence of a gift to a class, that it is not made independently to each member of the class, *Krishnath v. Atmaram*, 16 Bom. 548 *Ci. Re Jackson v. Ashworth*, L.R. 26 Ch. D 162 ; *Re Moss : Kingsbury v. Walter*, (1901) A.C. 187. When all the members of a so-called class are individually named in the will, it will really be a case under sec. 107 rather than under this section, *Smith v. Smith*, *supra*.

Meaning of the Section :—When the gift is to a class, described by a common name, no person who does not answer the description can participate in the bequest. As to what is or is not a gift to a class, *vide* next paragraph.

Distinction between a gift to a class and a gift to an individual :—A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; and a gift to individuals, described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named, *Barber v. Barber*, 3 My. & Or. 688. When the gift is to a class, you look to the description, and anybody who answers that description, gets the legacy. But when the gift is to individuals, you consider separately and independently the case of each individual, *Ibid*; see also *Krishna v. Atmaram*, 15 Bom., 678. There is another point of distinction between the two. In the case of a gift to a class, all the members of it take as joint tenants, with the right of survivorship as among them, but in the other case, the donees take as tenants in common. Cf. *Re Stanhope's Trusts*, 27 Beav., 201. A gift "to my nine children" is not a gift to a class, *Re Smith's Trust*, L.R. 9 Ch. D. 117; *Re Stanfield*, L.R. 15 Ch. D. 84; similarly, a gift to grandchildren by E is not a gift to a class, *Administrator-General v Money*, 15 Mad., 448; *Cally Nath v. Chunder Nath*, 8 Cal., 378; but a gift to A, B, C (daughters) together with other daughters to come is a gift to a class, 27 Beav. 201 (*supra*); *Ramlal v. Kanailal*, 12 Cal., 663. Cf. *Re Moors*, (1901) A.C. 187; *Drakesford v. Drakesford*, 33 Beav., 49 (48). Likewise, a bequest "to the male offspring of my daughter" is a gift to a class, *Manjanima v. Padmanabhayya*, 12 Mad., 398; *Mangaldas v. Tshhubandas*, 16 Bom., 662; *Soudaminy Dass v. Jagesh Chunder*, 2 Cal. 262; expressions like "sons' sons", "daughters' sons", "sons' children or widow", constitute classes, *Khemji v. Morarji*, 22 Bom. 633. Cf. *Krishna Rao v. Benabai*, 20 Bom., 571; *Mahomed Jafferbhoy v. Dame Janbai*, 3 Bom. L.R. 785; *Aspinall v. Duckworth*, 36 Beav. 307. This is the position with respect to the expression "son's descendants", see *Sree Chand Sowcar v. Kast Chetty*, 1933 M.W.N. 1222-66 M.L.J. 170-38 L.W. 860-A.I.R. 1933 Mad. 885-147 I.C. 983.

N.B.—As to the liability of a gift to a class to be defeated by the rule of Perpetuity, see *Burnyeat v. Burnyeat*, (1923) 2 Ch. 52.

99. [Suc. S. 86] In a will—

Construction of terms.

(a) the word "children" applies only to lineal descendants in the first degree of the person whose "children" are spoken of;

(b) the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "grand-

children" are spoken of;

- (c) the words "nephews" and "nieces" apply only to children of brothers or sisters;
- (d) the words "cousins," or "first cousins," or "cousins-german," apply only to children of brothers or of sisters or the father or mother of the person whose "cousins," or "first cousins," or "cousins-german," are spoken of;
- (e) the words "first cousins once removed" apply only to children of cousins-german, or to cousins-german of a parent of the person whose "first cousins once removed" are spoken of;
- (f) the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of;
- (g) the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of;
- (h) words expressive of collateral relationship apply alike to relatives of full and of half blood; and
- (i) all words expressive of relationship apply to a child in the womb who is afterwards born alive.

N. B.—The section does not apply to Hindus etc., see Goberdhonedas v. Prafulla Bala, A.I.R. 1939 Cal. 697.

Construction of terms:—This section simply defines certain terms of relationship, and says that when these terms occur in a will, they are to be understood in the respective senses assigned to them by this section. The enumeration in the section is not exhaustive, and in construing any term not occurring herein, English decisions may be referred to as a guide. As to the Court's duty to look to the plain meaning of a term, see *Krishnaao v. Benabar*, 20 Bom., 571. Cf. *Khub Singh v. Ramjilal*, 41 All. 666.

Children:—It means the immediate issue of the marriage; the descendants in the first generation. *Gibson v. Gibson*, (1901) 1 Ch. 40; and does not extend to grandchildren. *Radcliffe v. Buckley*, 10 Ves. 195; *Smith Lord v. Hayward*, 35 Ch. D. 558; it also means, heirs of the body. *Byng v. Byng*, 10 H.L. Cas. 171; but does not include step children. *Blankenbaker v. Synder*, 86 S.W. 1124; under the English Law, in the absence of child, a bequest to children may go to "grand-

children", *Orooke v. Brooking*, 2 Vern. 108; *Berry v. Berry*, 9 W. R. (Eng.) 889; *Morgan v. Thomas*, 51 L.J.Q.B., 556, but it is doubtful if that is possible under this Act. The Indian Legislature seems never to have accepted this view. The old section 86 was not very clear on this matter, but it has been amended by inserting the words in italics in Cl. (a), viz. "of the person whose 'children' are spoken of"—"We have amended this clause to express the meaning more clearly."—*Notes on Clauses*. The term includes only legitimate issue, *Hill v. Crook*, L.R. 6 H.L. 266: such legitimacy will be determined with reference to the law of the father's domicile, *Re Andros*, 24 C.D. 673. *Vide also* at p. 24, *ante*: also *Jagndish v. Ras-pada*, A.I.R. 1941 Pat. 458. For children *en ventre sa mere*, see *Pratt v. Mathew*, 23 Beav. 359; *Vellar v. Gilbey*, (1907) A.C. 189; also the notes at p. 46, *ante*. The expression "pay to children" signifies a tenancy in common, (1950) 1 All. E.R. 120.

Grand Children :—Do not include great-grand-children *Waring v. Lee*, 8 Beav., 247; *Oxford v. Churchill*, 8 Ves. 69; the term (under the English Law and possibly not under this Act) can be extended to great-grandchildren, when there are no grandchildren.

Nephews and Nieces - *prima facie* accepted in the ordinary sense of the terms, *Re Cozens* (1903) 1 Ch. 188; like "child" and "grandchild" they are capable of being extended to remoter descendants. Cf. *Waring v. Lee*, 8 Beav. 247. Cf. *Parker v. Osborne*, (1897) 2 Ch. 208; *Redford v. Hughes*, (1908) 1 Ch. 198; *Alexander v. Alexander*, (1919) 1 Ch. 371: 88 L.J. Ch. 242.

Cousins and First Cousins, Cousins-German :—*Vide notes* at p. 46, *ante*.

Issue :—Ordinarily it is equivalent to "descendants" *Re Smith*, 35 Ch. D. 558. It was taken to mean children in *Re Hopkins Trust*, (1878) 9 Ch. D. 191: For the meaning of this term, see *Re Burnham-Carrick v. Carrick*, (1918) 2 Ch. 196. Cf. *Edyvean v. Archer*, (1903) A.C. 379: *Bradshaw v. Bradshaw*, (1908) 1 I.R. 288.

Descendants :—See *Ralph v. Carrick*, 11 Ch. D. 873.

100. [Suc. S. 87] In the absence of any intimation to the contrary in a will, the word "child", the word "son," the word "daughter," or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.
Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate.

Illustrations.

- (i) A having three children, B, C and D, of whom B and C are legitimate and D is illegitimate, leaves his property to be equally divided among "my children."

The property belongs to B and C in equal shares, to the exclusion of D.

(ii) A, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(iii) A, having in his will enumerated his children, and named as one of them B, who is illegitimate, leaves a legacy to "my said children." B will take a share in the legacy along with the legitimate children.

(iv) A leaves a legacy to "the children of B." B is dead and has left none but illegitimate children. All those who had at the date of the will acquired the reputation of being the children of B are objects of the gift.

(v) A bequeaths a legacy to "the children of B." B never had any legitimate child. C and D had, at the date of the will, acquired the reputation of being children of B. After the date of the will and before the death of the testator, E and F were born, and acquired the reputation of being children of B. Only C and D are objects of the bequest. [See *Mortimer v. West*, 3 Russ. 370—seems to be over-ruled, *vide Re Hasle's Trust*, 35 Ch. D. 728.]

(vi) A makes a bequest in favour of his child by a certain woman, not his wife. B had acquired at the date of the will the reputation of being the child of A by the woman designated. B takes the legacy. [See *Gordon v. Gordon*, 1 Merivale, 142; *Pratt v. Mathew*, 22 Beav. 339.]

(vii) A makes a bequest in favour of his child to be born of a woman who never becomes his wife. The bequest is void.

(viii) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

N. B.—This section does not apply to Hindus etc.

The Principle of the Section:—This section, in the first place, gives effect to the common juristic notion that a bastard is a *nullius filius* (no body's son), and is based on the Latin maxim, *Qui ex damnato constitutus inter liberos non computentur* (Co. Litt. 8a)—those who are born from unlawful intercourse are not counted among the children,—and then further provides that when there is no legitimate relative (as contemplated by the section), then a person who has acquired at the date of the will the reputation of being "such relative," will come in the place of a legitimate relative. Cf *Wilkinson v. Adam*, 1 Ves & Beav. 422; *Smith v. Massey*, 30 Bom., 500. The meaning of the last two words "such relative"

is not very clear; according to strict grammatical construction, the expression, ought to mean "such legitimate relative," but the context, the marginal notes and the illustrations appended to the section do not support such a strict construction. It seems that the *reputation* should not be that of a *legitimate relative*, but only of a *relative*. Cf. *Earle v. Wilson*, 17 Ves. 528; *Ingam v. Rayner*, (1894) 2 Ch. 89; *Re Byan*, 30 C.D. 110; *Re Hall*, 35 C.D. 551; it should not be forgotten that a bastard being a *nullius filius*, can have a "father" only by reputation, *Re Bolton*, 31 Ch. D. 542; *Pratt v. Mathew*, 22 Beav. 389.

"Any Intimation to the Contrary":—The principle of this section may be rendered inapplicable by evincing an intention in the will itself to include illegitimate children. For instance when an illegitimate child is mentioned in the will by name, *Chislon v. Goodbun*; L.R. 6 Eq. 278; or by giving a description identifies an illegitimate child, *Dover v. Alexander*, 2 Hare, 262. But where there is no such contrary intention, the general rule prevails and the illegitimate children will be excluded; *Vide Re Pearce*, (1913) 2 Ch. 674 (on appeal (1914) 1 Ch. 254), following *Re Brown*, 63 L.T. 159. In a gift by an unmarried person to his mistress and her sons there must be an intimation that the illegitimate sons are meant, *Udit Singh v. Amir Kumar*, 23 I.O. 348 (Cal.). The intimation should appear in the will, and no extrinsic evidence is admissible for the purpose, *vide* under the heading "Evidence," below.

"Any word which expresses Relationship":—This expression is wide enough to include all relations, whether lineal or collateral, such as nephews and nieces and next-of-kin, see *Re Brown*, 97 W.C. (Eng.) 472; *Re Drakin*, (1894) 3 Ch. 366; *Re Hall*, 35 Ch. D. 551; *Re Parker*, (1897). 2 Ch. 208.

At the date of the Will:—Under this section the reputation of being the children of a particular person must be acquired at the date of the will; *vide* *Illus.* (v). So, illegitimate children born after the date of the will, cannot take any bequest, *Re Bolton*, *supra*. Cf. *Re Hartie's Trusts*, 35 Ch. D. 728; *Re Goodwin's Trusts*, L.R. 17 Eq. 345. As a matter of fact law does not favour any bequest to prospective illegitimate children as that would encourage immorality, and though the law in England now, out of sympathy for these unfortunate children, applies this rule with less rigidity (*Ocoleston v. Fullalove* L.R. 9 Ch. 147; *Re Hartie's Trust*, *supra*), the Indian Law maintains the old rigid rule of *Re Bolton's* case. Cf. *Mortimer v. West*, 3 Russ. 370. For the purposes of this section a child in the womb is taken as a child in esse, *Pratt v. Mathew*, 22 Beav. 389; Cf. *Earle v. Wilson*, 17 Ves. 528.

Evidence:—Under this section no extrinsic evidence can be adduced to prove the *intimation* that illegitimate children are meant to be included. But such evidence is admissible to prove the *reputation* of the relative at the date of the will,

see Wilkinson's case, *supra*, and the testator's knowledge of such reputation, *Tyler v. Dalrymple*, 2 Mer. 419.

101. [Suc. S. 88] Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the will to show what he intended, the following rules shall have effect in determining the construction to be put upon the will:—

- (a) If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the codicil, he is entitled to receive that specific thing only.
- (b) Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.
- (c) Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.
- (d) Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In clauses (a) to (d) of this section, the word "will" does not include a codicil.

Illustrations.

(i) A, having ten shares, and no more, in the Imperial Bank of India, made his will, which contains near its commencement the words "I bequeath my ten shares in the Imperial Bank of India to B". After other bequests, the will concludes with the words "and I bequeath my ten shares in the Imperial Bank of India to B." B is entitled simply to receive A's ten shares in the Imperial Bank of India.

(ii) A, having one diamond ring, which was given him by B, bequeaths to C the diamond ring which was given by B. A afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B.

(iii) A, by his will, bequeaths to B the sum of 5,000 rupees and afterwards in the same will repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only. [See *Garth v. Meyrick*, 1 Bro. C.C. 30; *Halford v. Wood*, 4 Ves. 76; *Manning v. Thesiger*, 3 My & K. 29.]

(iv) A, by his will, bequeaths to B the sum of 5,000 rupees and afterwards in the same will bequeaths to B the sum of 6,000 rupees. B is entitled to receive 11,000 rupees. [See *Yockney v. Hansard*, 3 Hare, 622; *Curry v. Pile*, 2 Bro. C.C. 228.]

(v) A, by his will, bequeaths to B 5,000 rupees and by a codicil to the will he bequeaths to him 6,000 rupees. B is entitled to receive 10,000 rupees. [See *Ridges v. Morison*, 1 Bro. C.C. 368; *Johnstone v. Harrowby*, 1 De G. F. & Jr. 189; *Cresswell v. Cresswell*, L.R. 6 Eq. 69.]

(vi) A, by one codicil to his will, bequeaths to B 5,000 rupees and by another codicil bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(vii) A, by his will, bequeaths "500 rupees to B because she was my nurse," and in another part of the will bequeaths 500 rupees to B "because she went to England with my children". B is entitled to receive 1,000 rupees. [See *Masters v. Masters*, 1 P. Wms. 421].

(viii) A, by his will, bequeaths to B the sum of 5,000 rupees and also, in another part of the will, an annuity of 400 rupee. B is entitled to both legacies. [See *Hodges v. Peacock*, 3 Ves. 735.]

(ix) A, by his will, bequeaths to B the sum of 5,000 rupees and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.

N. B — This section is applicable to Hindus etc.

Double Bequests:—This section prescribes rules of construction for the case where the testator makes two bequests to the same person and the question arises whether such bequests are mere repetition or substitutional or cumulative, the will itself indicating no solution.

Four cases arise under the section,

Cl. (a):—Where the same specific thing is given twice to the same person in the same will or once in the will again in the codicil. The legatee gets only the specific thing.

Cl. (b):—When the *same* amount is given twice in the same will or in the same codicil, the legatee gets only *one* legacy.

Cl. (c):—When unequal amounts are given in the same will or in the same codicil, the legatee gets *both* of them.

Cl. (d):—Where two legacies (equal or unequal), are given one by a will and the other by a codicil, or each by a separate codicil, the legatee gets *both* the legacies.

The Principle of the Section :—The principle underlying the above four cases may be summed up as follows :—(1) The bequest of the *same specific thing* in the same or different documents implies only *repetition*, because the same object cannot be given twice ; it is physically impossible to do so, see illus. (i) and (ii), and *Duke of Albans v. Beauclerk*, 2 Atk. 636. (2) The bequest of the *same amount twice* in the same instrument likewise implies repetition, see illus. (iii) and the cases mentioned against that illustration, but (3) *same amount* in "different" instruments produces a cumulative effect, (4) Double gifts of *unequal amounts* whether in the same or different instruments are always cumulative, *vide* illus.'s (iv), (v), (vi) and (viii) and the cases cited against those illustrations ; also *Holley v. Hutton*, 1 B.C. C.O. 390 ; and *Davies v. Mackintosh*, (1967) 3 All. B.R. 62.

The above rules apply only when there is nothing in the will to show what is intended. So where there is an *intrinsic* evidence to show that a contrary thing is intended, these rules do not apply : see illustration (vii) and *Masters v. Masters*, 1 P. Wms 423. Such contrary intention also appears in illustrations (viii) and (ix). When unequal amounts are given, it may appear from *intrinsic* evidence in the will, that the legacies are only *alternative* or *substitutional* ; in such a case the legatee takes only one gift, *vide Williams on Executors*, (11th Ed.), p. 1035 ; *Russell Dickson*, 4 H.L.C. 293 ; *Whyle v. Whyle*, L.R. 17 Eq. 60. The bequest of a share as well as of the residue is internal evidence of what is intended, *Kirkpatrick v. Bedford*, L.R. 4 A.C. 96. Double gifts of the *same amount* (though in different documents) springing from the same motive may be *intrinsic* evidence of the fact that they were intended to be mere substitutional, *Bonyon v. Bonyon*, 17 Ves., 34.

Evidence of Contrary Intention :—The aforesaid rules about double gifts are mere rules of construction (and not of presumptive evidence), which the Court is to apply in absence of any indication in the will itself of the testator's intention. *Vide* the notes, *supra*, under the heading, 'The Principle of the Section' ; therefore no question of extrinsic evidence arises under this section ; *Higgins v. Dawson* (1902) A.C. 1.

102. [Suc. S. 89] A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Construction of residuary legatee.

Illustrations.

(i) A makes her will, consisting of several testamentary papers, in one of which are contained the following words:—"I think there will be something left, after all funeral expenses, etc., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee, [taken from *Leighton v. Baillie*, 3 M. & K. 267].

(ii) A makes his will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure." B is constituted the residuary legatee, [taken from *Boys v. Morgan*, 9 Sim., 289].

(iii) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

N.B.:—This Section applies to the wills of Hindus etc.

Residuary Legatee how Constituted:—A residuary legatee may be constituted by any words showing the testator's intention to give the surplus or residue of his property. No particular form of expression is necessary to constitute a residuary legatee; the testator's intention to constitute a person his residuary legatee is quite enough. [*Mt. Chhab Bai v. Chunnia Bai*, A.I.R. 1935 Nag. 239; *Sarat Chandra v. Panchanon*, A.I.R. 1953 Cal. 471]. Thus the words "should there be any surplus after the above expenditure" were held to constitute a residuary bequest. *Dwarkanath Bysack v. Burroda*, 4 Cal. 443; likewise, the bequest of the surplus was a residuary bequest. *Ashutosh Dutt v. Doorga Charan*, 6 I.A. 182 : 6 Cal. 438 (P.C.); *Rustomji Framji v. Lentin*, 22 Bom. I. R. 355; see also *Fanindra Kumar v. Administrator-General*, 6 C.W.N. 321; *Manorama Dassi v. Kally Charan*, 81 Cal. 166. Similarly, a bequest of "what is left, my books, furniture etc.", is a residuary one. *Re Cadge*, L.R. 1 P. & D 544; Cf. *Re Egan*, (1899) 1 Ch. 688; *Re Bramley*, (1902) P. 106; *Barnados v. Income Tax Commissioner*, (1921) 2 A.C. 1; *Treepoora-soondery v. Debendronath*, 2 Cal. 45; *Anandorao v. Administrator-General*, 20 Bom. 450; *Re Cadogan*, 26 C.D. 154; *Damoder Das v. Dayabhai*, 21 Bom., 19; *Re Smith*, 42 O. D. 302; Cf. I.L.R. (1954) Nag. 315 = A.I.R. 1954 Nag. 277; *Jairam v. Kessowjee*, 4 Bom. L.R. 555. The words, "I also give to my niece all my personal

property and effects," constitute a residuary gift, *Elizabeth O'Donoghue v. Sutherland*, 12 Bang. 705 = A.I.R. 1935 Bang. 71 = 155 I.C. 310.

A residuary legatee gets no interest in the estate until the residue has been ascertained, *Secretary of State v. Parejat Dabi*, 60 Cal. 1185 = 37 C.W.N. 769 = A.I.R. 1933 Cal 841. Read the notes under sec. 966, *post*. The illustrations appended to the section make it perfectly clear that in order to constitute a residuary legatee it is not necessary that there should be other legatees as well, *Haripada Saha v. Gobinda Chandra*, 51 C.W.N. 917.

Surplus or Residue :—As to the meaning of the terms, "Surplus" or "Residue" see *Dwarka Nath Bysack's case*, *supra*; *Attree v. Attree*, L.R. 11 Eq. 280; *Smyth v. Smyth*, 8 Ch. D. 561. Ordinarily, the term "residue" will imply all such properties of the testator as have not been effectively disposed of, *Re Bagot* (1898) 3 Ch. 348; *Blight v. Hartnoll*, 28 Ch. D. 218; also *Jairam's case*, *supra*. As to the "ultimate surplus" of the residue, see *Kedar Nath v. Atul Krishna*, 12 C.W.N. 1086 in which it has been held at p. 1086, that such *ultimate surplus* of the residue passes as on intestacy. Cf. *Robinson v. Taylor*, 2 Bro. C. C. 589; *Motilal v. Gurishankar*, 12 Bom. L.R. 947. As a general residuary gift of personality sweeps up all the personal properties of the testator, it follows that if a prior bequest fails that will also fall into the general residue, *Elizabeth O'Donoghue v. Sutherland*, 12 Bang. 705 = A.I.R. 1935 Bang. 71 = 155 I.C. 310

Words not Constituting Residuary Legatee :—Vide *Re Ashen*, 6 P.D. 203; such words as "whatever may remain to my account after payment of debts etc.," (*Hastings v. Hane*, 6 Sim. 67), or "three or four thousand pounds or whatever remaining sum" (*Wrench v. Jutting*, 3 Beav., 521), have been held not to constitute a residuary bequest. Where, under a will a certain immoveable property consisting of a bungalow and garden was bequeathed to the defendant with a direction that half the income should go to the plaintiff, the legacy to the defendant cannot be called residuary legatee, *Julia Margaret v. Severina Sabina*, 20 L.W. 748; A residuary clause however does not apply to the property unknown to the testator, *Kunthalammal v. Surayappa Mudaliar*, 38 Mad. 1096 : 29 M.L.J. 682 : 31 I.C. 494. In this respect the Indian law differs from the English law under which a residuary clause embraces every property not otherwise effectually disposed of, *Easum v. Appleford*, 5 My. & Cr. 56 (62); *Re Bagot*, (1898) 3 Ch. 348. Read *Subodh Chandra Niyogi v. Bhulabika Dasses*, 60 Cal. 1406 = A.I.R. 1934 Cal. 356 = 149 I.C. 410.

Where the residuary legatee is a trustee and the trust fails for uncertainty :—Where the bequest of a residue is in favour of trust, the trustee becomes the residuary legatee, and if the trust fails for uncertainty, a resulting trust arises in respect of the residue for the benefit of the beneficiaries as on intestacy; the persons claiming

the residue by virtue of the resulting trust are not persons claiming under the will but *de hors* the will, *Vedabala Devi v. Official Trustee of Bengal*, 62 Cal., 1062—89 C.W.N. 1154.

103. [Suc. S. 90] Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Property to which
residuary legatee
entitled.

Illustration.

A by his will bequeaths certain legacies, of which one is void under section 118, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his will A purchases a zamindari, which belongs to him at the time of his death. B is entitled to the two legacies and the zamindari as part of the residue.

N.B. :—This section applies to Hindus etc.

The Principle of the Section :—The section says that a "residuary legatee" is entitled to *all the property* of the testator *at the time of his death*, that remains undisposed of, see *Fanindra Kumar v. Administrator-General*, 6 C.W.N. 321,—referring to *Re Bagot*, (1893) 3 Ch. 848 and *Blight v. Hartnoll*, (1883) 23 Ch D. 218. So, a disposition which is not capable of taking effect, and which consequently lapses, falls into the residue. *Ibid*; *Cambridge v. Rous*, 8 Ves., 12; also *Camani v. Barefoot*, 26 Mad., 438. Likewise, where the property remains unexhausted by the specific bequests, the surplus falls into the residue. *Dwarkanath Bysack v. Burroda*, 4 Cal. 443; *Chapman v. Brown*, 6 Ves., 404; *Sadler v. Turner*, 8 Ves., 617; *Bapubhai v. Manukbati*, 2 Bom., 388; *Morarji v. Nenbai*, 17 Bom., 351. As to ultimate surplus of residue, see *Kedarnath v. Atul Krishna*, 12 C.W.N. 1028 (per Fletcher J); also sec. 108, *infra*. For other cases, see *Re Wooley Cathcart*, (1918) 1 Ch 33; *Re Clarke Beacey*, (1929) 2 Ch. 407; *Surat Chandra v. Panchanan*, A.I.R. 1953 Cal. 471; *Re Sou Prasad*, A.I.R. 1954 Cal. 444; I.L.R. (1954) Nag. 315—A.I.R. 1954 Nag. 277.

All Property, etc. :—The term is very comprehensive. It will comprise both moveable and immoveable property. *Munmohan Ghosal v. Purush Nath*, 22 W.R. 174. Vide also *Dwarkanath Bysack's case, supra*; all undisposed of property possessed of properties at the testator's death fall within the meaning of this expression, *Jones v. Mitchell*, 1 Sim. & Stu. 290; *Abdul Hussin v. Sugranbi*, A.I.R. 1939 Sind., 322—186 I.C. 462. Cf. *Camani v. Barefoot*, 26 Mad. 438 (*supra*); *Leake v. Robinson*, 2 Mer. 321. "All property"

includes lapsed legacies [*Omanji's case*; *Re Meredith's Trusts*, 3 Ch. D. 757], and void legacies as well as after-acquired properties, reversions and properties over which the testator has a general power of appointment, *Blight v. Hartnoll*, 28 Ch. D. 218; Cf. *Fanendra Kumar v. Administrator-General*, 6 C.W.N. 321; *Manorema Dass v. Kally Churn*, 81 Cal. 166; also *Re Spencer's Trusts*, 2 Sim. N.S. 129. In India, the law of succession not recognising any distinction between movable and immovable property, the word "effects" used in an Indian will may mean both realty and personalty; but in particular contexts it may be confined to personal property or chattels only *John Agabog v. James Golder Robinson*, 54 I.A. 276 = 5 Rang. 427 = 46 O.L.J. 126 = 31 C.W.N. 1078 = 58 M.L.J. 71 = 29 Bom. L.R. 1017 = 26 A.L.J. 713 = A.I.R. 1927 P.C. 151 = 102 I.C. 639 (P.C.). Where the testator only grants a life-estate, and does not make any specific provision for the remainder, the remainder remains undisposed of, and forms part of the residue, *Shrinbai v. Ratanbai*, 48 Bom. 846 : 21 Bom. L.R. 384 : 51 I.C. 209. A will speaks from the time of the testator's death (sec. 90, *supra*); therefore a property which does not answer the description of a legacy (being converted into some other form of property during the testator's life-time) will be regarded as a property undisposed of within the meaning of this section. Cf. *Mayfield v. Newton*, 2 Coll. 520 (note). A legacy also lapses under sec. 105, below if the legatee predeceases the testator. Under the Indian law, a residuary clause does not apply to property unknown to the testator: the law in this respect differs from the English law, *Subodh Chandra Nyogi v. Bhubalika Dasses*, 60 Cal. 1406 = A.I.R. 1934 Cal. 356 = 149 I.C. 410.

Residuary Bequest—General and Particular:—A residuary bequest is general when it comprises all that remains undisposed of out of the testator's entire property, see *Re Bagot, supra*; *Bernard v. Minshull*, 1 Johns. 276. It is particular when the testator sets apart a particular fund, and after providing out of it for various legacies to different persons, gives the residue to an individual. Cf. *Kedarnath's Case, supra*. A provision in the will that the donee is to take all the properties found to belong to the testator but not mentioned in the will is a good residuary bequest, *Meherwan Jehangir v. Dhunbhai Karasha*, (1940) 1 M.L.J. 913 = 1940 M.W.N. 569 = A.I.R. 1940 Mad. 785. As to what will be the position if the non-mentioned properties are themselves unknown to the testator, read the notes under the next heading.

Unknown property—residuary clause does not apply to:—So far as the Indian Law is concerned, a residuary clause does not apply to property unknown to the testator. In this respect the Indian law differs from the English law, *Subodh Chandra Nyogi v. Bhubalika Dasses*, 60 Cal. 1406 = A.I.R. 1934 Cal. 356 = 149 I.C. 410. Far less will it apply to a property which, although it is in the possession of the testator, does not belong to him, *Sombhai v. Jagjevan*, 80 Bom. L.R. 987 = A.I.R. 1928 Bom. 880 = 114 I.C. 377.

When Lapsed Legacy falls into Residue:—Under sec. 105, when a legacy lapses, it falls into the residue, *unless there be a contrary intention in the will itself*. Whether a lapsed legacy will or will not fall into the residue is to be determined with reference to the testator's intention appearing from the will; for instance, the testator gives a legacy to B and the residue to A. Here if the testator intended that in any event A is to get his property with the exception of the property bequeathed to B, then if the legacy to B lapses, it will not go to increase A's share. The whole question is whether the testator intended to deprive A of the property (bequeathed to B), or he simply desired to deprive A only in the event B is capable of taking, so that if B does not take, there is no deprivation, and the lapsed legacy falls into the residue. See *Blight v. Hartnoll, supra*; *Re Bagot, supra*; *Easum v. Appleford*, 5 My. & Cr. 59; *Bernard v. Minshull, supra*; *Elizabeth v. Sutherland*, A.I.R. 1896 Rang. 184—161 I.C. 997—distinguishing *John Agabag's case* (54 I.A. 276, *infra*); also *vide* sec. 108, *infra*. Where all the properties have been disposed of, upon failure of the specific legacies, they pass to the residuary legatee and not as on intestacy. *Elizabeth v. Sutherland, supra*. In *John Agabag's case*, only the undisposed of surplus passed as on intestacy.

Residuary Bequest of personal property: English law:—Under the English law, a residuary bequest of personal property comprises a legacy of personal property which has failed by lapse or by being void *ab initio*. *Smith v. Smith*, 29 S.L.R. 374 = A.I.R. 1936 Sind, 158 = 164 I.C. 889.

Right of heir where no Residuary Bequest:—Where there is no residuary bequest, the surplus or residue of the testator's property goes to his heirs as on intestacy. *Tagore v. Tagore*, 9 B.L.L. 377 : 18 W.R. P.C. 359; *Morarji v. Nenbar*, 17 Bom. 351; *Sonatun Bysack v. Juggut Sundares*, 8 M.I.A. 66 (87); *Damoderdas v. Dayabhai*, 21 Bom. 1 (22 Bom. 895); *Vundravan Das v. Cursondas*, 21 Bom., 646. Com. *Lakshmi Narasamma v. Ammannan Siddhanti*, 71 M.L.J. 845 = 1936 M.W.N. 902 = A.I.R. 1937 Mad. 26 = 168 I.C. 247; *John Agabog Vertannes v. James Golder Robinson*, 54 I.A. 275 = 5 Rang. 427 = 46 C.L.J. 126 = 31 C.W.N. 1078 = 53 M.L.J. 71 = 29 Bom. L.R. 1017 = 25 A.L.J. 718 = A.I.R. 1927 P.C. 151 = 102 I.O. 689 (P.C.) [the undisposed surplus goes to the heirs as on intestacy]. The heirs in such a case claim not under the will but *de hors* the will. *Vedabales Devi v. Official Trustee of Bengal*, 62 Cal. 1062 = 39 C.W.N. 1154.

Testator cannot defeat such Right except by Devise:—Where there is no residuary bequest the surplus goes to the heirs as on intestacy and the testator cannot then defeat the heirs' right by altering the line of succession. See *Tagore v. Tagore, supra*; *Prosunno Kumar v. Tarruck Nath*, 10 B.L.R. 267; *Gokoolnath v. Issur Lochun*, 14 Cal. 922; so bequest of a portion of the property does not exclude the heir from the undisposed part of the residue. *Toolseydas v. Premji Tricumdas*, 18 Bom. 61; it is only by means of a positive devise, and not by use of mere

negative words that a person can alter the line of succession, *Erasha Khaikhasru v. Jerbai*, 4 Bom 587. *Vide also* under the heading, "Go as undisposed of" under sec. 108, *post*.

104. [Suc. S. 91] If a legacy is given in general terms,
Time of vesting legacy without specifying the time when it is to be paid,
in general terms. the legatee has a vested interest in it from the day
of the death of the testator, and, if he dies without
having received it, it shall pass to his representatives.

N. B :—This Section is applicable to Hindus etc.

It provides that if a legacy is given in general terms, it vests in the legatee from the moment of the testator's death. Cf. *Garthshore v. Chalie*, 10 Ves., 18. For the construction of this section, read generally, (1958) S.C.J. 420 = A.I.R. 1958 S.C. 304. The testator's death is ordinarily the time of payment or distribution of the fund bequeathed, *Jehangir v. Kaikhosru*, 18 Bom. L.R. 141 : 9 I.C. 951. It is however open to the testator to direct the class of heirs or next-of-kin to be ascertained at any time and in any manner, he chooses. *Dinbas v. Nusserwanji*, 28 I.C. 481 (Sind).

Vested Interest:—If the legacy be in general terms, it vests in interest (though not necessarily in possession see sec 119, *infra*) in the legatee, the very moment the testator dies, see *Garthshore's case, supra* so the property will vest even though its actual enjoyment is delayed, (*Rewan Pershad v. Radha Beby*, 4 M.I.A. 187; *Khaikhosru v. Shrinibai*, 46 I.A. 267 : 21 Bom. L.R. 180. *Bilaso v. Munnalal*, 38 All. 558 : 8 A.L.J. 677 : 11 I.C. 616; *Sreechand Soucar v. Kasi Chetty*, 66 M.L.J. 170 = 1933 M.W.N. 1222 = 38 L.W. 860 = A.I.R. 1933 Mad. 885 = 147 I.C. 863. Therefore, in the absence of any direction in the will as to the time when the legacy is to be distributed, the legacy becomes payable immediately upon the testator's death; *Bilaso v. Munnalal*, 38 All. 558; *Chundra Kishore v. Prasanna Kumari*, 38 I.A. 7 : 38 Cal. 327 : 15 C.W.N. 121 : 19 C.L.J. 58 : 8 A.L.J. 96 : 21 M.L.J. 116; (1911) 2 M.W.N. 30 : 13 Bom. L.R. 67 : 9 I.C. 122 (P.C.); the vesting of the property is not postponed by the mere fact that the testator while giving his property to his grandsons, directed that certain persons are to be given certain pensions and that the estate will not be divided until the death of the last pensioner, *Callynath v. Chunder Nath*, 8 Cal. 378. Cf. *Khaikhosru v. Shrinibai*, 48 Bom. 88 : 23 O.W.N. 419 : 61 I.C. 481 (P.C.); *Gokoolnath v. Issur Lochan*, 14 Cal. 222. Vesting of the property is not deferred also by reason of any direction as to the management of the property, *Mstnt. Ram Kuar v. Atma Singh*, 8 Lab., 181 = 28 P.L.R. 355 = A.I.R. 1927 Lah. 404 = 103 I.C. 506.

Vested Remainder after life-estate. a life-estate is created by will the remainder cannot remain in suspense, but must vest in some one, *Kuar Nageshar v. Kuar Mata*, 26 O.C. 189 : 9 O.L.J. 285 : (1922) Oudh, 236; *Sisir*

Chandra v. Ajit Kishore, 68 C.L.J. 82—42 C.W.N. 605—A.I.R. 1938 Cal. 466—177 I.C. 764; *Sriram v. Mahomed Rahim*, 1938 O.W.N. 67—A.I.R. 1938 Oudh, 69—172 I.C. 382; *Siddappaji v. Nanjappa*, 6 Mys. L.J. 801. [Read the notes and cases under heading "Vesting of Deferred Gifts" under sec. 119, post]. The mere interposition of a life-estate does not prevent the vesting of the remainder in the remainder-man. *Visvanadhan v. Anjaneyavalu*, 1935 M.W.N. 1119—A.I.R. 1935 Mad. 865—158 I.C. 1088—distinguishing 12 Mad. 411. Cf. *Satyabhamabai v. Puspalaabai*, I.L.R. (1954) Nag. 315—1954 Nag. L.J. 497—A.I.R. 1954 Nag. 277. Of course, under sec. 337, the executor has the power to postpone payment or delivery of the legacy till the expiration of one year from the testator's death. This section should be read along with sec. 332, post, under which the legatee's title is not complete or perfected until he obtains the assent of the executor or the administrator, though under this section the legacy vests in him irrespective of such assent, see *Bachman v. Bachman*, 6 All. 583. The estate vested is not full or absolute, until the executor's assent is given, and till then the legatee's rights are only inchoate, *Lakshamma v. Ratnamma*, 38 Mad. 474 : 26 M.L.J. 566 : 21 I.C. 696. Acceptance of the gift by the legatee is also necessary, inasmuch a legacy, even if vested, would be divested by the legatee's disclaimer, *Ibid.* See also *Eavestaff v. Austin*, 19 Beav. 591; *Re Young*. (1918), 1 Ch. 272; read also the notes under the heading, "Effect of disclaimer of legacy" under sec. 105, post. Where a will directed that on the youngest son attaining the age of 21, the executrix should divide the property among the sons, it was held that the direction only postponed partition to a particular date and did not contain a gift to the sons, and therefore the question of vested interest could not arise, *Poorenra v. Hemangini*, 36 Cal 76 : 12 C.W.N. 1002 : 4 I.C. 523. For cases relating to questions of vested remainder under a Mahomedan will, see *Banoo Begum v. Mir Abed Ali*, 32 Bom., 172; *Umesh Chandra v. Zahoor Fatima*, 17 I.A. 201; *Jaina Bai v. Sethna*, 34 Bom., 604 (612); *Cassamally v. Currimbhoy*, 36 Bom., 214 (253); *Abdul Wahid v. Nuran Bibi*, 11 Cal. 597 (P.C.).

Effect of Vesting—The effect of vesting is that if the legatee dies without receiving the property or actually enjoying it, his interest will pass on to his heirs. Cf. *Bilaso v. Munnelal*, 53 All. 568 : 8 A.L.J. 577; *Ellokashi v. Durponarain*; see also *Rama Niya Ammal v. Swami Pillai*, 22 M.L.J. 228; compare this section with sec. 19 of the Transfer of Property Act (IV of 1882). The section says in express terms that it passes "to his representatives" if the legatee dies during the pendency of an administration proceeding arising out of a contest over the will, his heir or representative can invoke the aid of this section for a direction on the administrator for handing over the property to him, *Secretary of State v. Parsijat Debi*, 60 Cal. 1185—37 O.W.N. 769—A.I.R. 1938 Cal. 841—150 I.C. 158.

105. [Suc. S. 92] (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the

In what case legacy lapses.

testator intended that it should go to some other person.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

(i) The testator bequeaths to B "500 rupees which B owes me." B dies before the testator; the legacy lapses. *Elliot v. Davenport*. 1 P. Wms. 83.

(ii) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the will is made. The legacy to A and his children lapses. See *Stevens v. King*, (1904) 2 Ch. 30; *Appleton v. Rowley*, L.R. 8 Eq. 139.

(iii) A legacy is given to A, and, in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(iv) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(v) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect. *Humberstone v. Stanton*, 1 Ves. & B. 35; *Williams v. Jones*, 1 Rus. 517.

(vi) The testator and the legatee perished in the same ship wreck. There is no evidence to show which died first. The legacy lapses. *Greenwoode v. Sutcliffe*, L.J. (1912) Ch. D. 298.

N. B.:—This section applies to Hindus etc., as it is of general application, *Krishnadas Tulsidas v. Dwarkadas Kaliandas*, I.L.R. (1937) Bom. 679—38 Bom. L.R. 829—A.I.R. 1936 Bom. 459—166. I.O. 172.

When Legacy Lapses:—If the legatee does not survive the testator, the legacy to him lapses or is extinguished, and goes as undisposed of part of the residue of the testator's property. *Alexius Jacob v. Dr. Alfred*, 6 D.L.R. (Pom.) 169. An exception to this rule will be found in sec. 109, *infra*, which please see. If a share in the residuary legacy lapses, it goes to the heirs as on intestacy see sec. 108, *infra*. Read *Shreedharan v. Bharathi Nambishtathiri*, 4 D.L.R. (Coch) 139. Cf. 6 D.L.R. (Bom.) 169, *supra*.

Lapsing apart from this Section :—This section contemplates only lapsing by death, but other circumstances may bring about a lapse of legacy; for instance, a legacy is given to an unmarried woman, so long as she remains unmarried, but she marries during the testator's life-time and the legacy lapses, *Andrew v. Andrew*, 1 Coll. 690.

To what cases the Doctrine of Lapsing of Legacy applies :—This doctrine applies both with respect to moveable and immoveable property, *Goodright v. Wright*, 1 P. Wms 397; it applies where the legacy is in the shape of a discharge to a debtor, or to a creditor. Cf. illustration (i), and the case cited against it; also *Stevens v. King*, (1904) 2 Ch. 80. The doctrine applies to a power of appointment; the appointee must survive the donee of the power or the power-holder, see *Jones v. Southall*, 32 Beav., 31; *Duke of Marlborough v. Godolphin*, 2 Ves. Sen. 61; *Freeland v. Pearson*, L.R. 8 Eq 658. Cf. *Williamson v. Farwell*, 35 Ch. D. 128. The doctrine will apply even when an annuity is payable to a certain person *putro pourtradi krame*. The words in italics are merely descriptive of the estate and show that an estate of inheritance has been conferred. They do not import a gift over to the sons and grandsons of the legatee; therefore if the legatee predeceases the testator the legacy lapses, *Jagadish Chandra v. Rai Pade Dhal*, A.I.R. 1941 Pat. 458—196 I.C. 66. Such a case is not within Illus. (iv) of this section, *Saroda Prosnd v. Devendranath*, 21 Pat. L.T. 37—A.I.R. 1940 Pat. 257—186 I.C. 172. The doctrine also applies to contingent bequests, see illus. (v) and the cases thereagainst. The doctrine does not apply to a gift to a class, if some members of the class survive the testator. Cf. sec. 106, *infra*. A gift to specific charity may lapse if the particular institution for the benefit whereof the bequest is made comes to an end during the testator's life-time, *Re Rayner*, (1895) 1 Ch. 19; also *Corbyn v. French*, 4 Ves. 431; *Re Overy*, 29 Ch. D. 560; *Re Sleavin*, (1891) 2 Ch. 236; *Re Buck*, (1896) 2 Ch. 727; *Re Waring*, (1907) 1 Ch. 166. Where the property is dedicated to an *idol*, and a shebait is appointed, the devise will lapse, if the shebait so appointed should die without taking charge of the property, *Sarada Sundari v. Govind Murti*, 2 B.L.R. 137, but compare *Gopal Lal Sett v. Purna Chandra*, 27 C.W.N. 174 (P.C.); *Sreepati Chatterji v. Krishna Chandra*, 41 O.L.J. 22: 29 C.W.N. 17. In case a general bequest to charity is made the doctrine of lapse will not apply, as then the Court will apply the doctrine of *Cy Pres*, to carry out the charitable intentions of the testator.

Intention of Testator that Legacy should not Lapse :—The principle of this section applies only when there is nothing in the will to show that the testator intended otherwise. The testator may prevent a legacy from lapsing by manifesting a clear intention to that effect in the will itself, *Shiv Dev v. Nanharia*, I.L.B. (1940) Lah. 583—A.I.R. 1940 Lah. 813—190 I.C. 682; *Koita Pullayya v. Veeraraghav Amma*, (1954) 2 M.L.J. (Andhra) 90—1954 M.W.N. 718—A.I.R. 1954 Andhra, 2—dissenting from A.I.R. 1936 Bom. 469, *supra*. Extrinsic evidence will

not be admissible to show such intention of the testator, *Maybank v. Brooks*, 1 Bro. C. O. 84.

Where the bequest is in the alternative or is substitutional, there may not be any lapsing; *Corbyn v. French*, 4 Ves., 418; *Re Posters Trusts*, 4 K. & J. 188; or, in other words, the testator may prevent lapsing by giving the property to some body else, *Sibley v. Cook*, 3 Atk. 672; *Ward v. Grey*, 26 Beav. 465. A mere declaration on the part of the testator that the bequest will not lapse is not effectual so as to prevent lapsing, *Pickering v. Stamford*, 8 Ves., 493; *Aspinall v. Duckworth*, 36 Beav., 307.

Effect of Testator and Legatee dying in a Shipwreck:—That is, when it is uncertain who predeceased whom, vide *Underwood v. Wing*, 4 De G. M. & G. 688.

Effect of Disclaimer of Legacy:—Vide notes at p. 208 ante. There, it must have been noticed that a legacy may be lost by disclaimer. Where a Mahomedan Taluqdar of Oudh, granted a life estate with a power to adopt to his widow, the latter refused both the estate and the power, with the result that she lost her life estate accelerating the estate of another legatee, *Azim Khan v. Sandai Ali Khan*, 8 O.W.N. 849—A.I.R. 1931 Oudh, 177—186 I.C. 642. A gift of a house with its contents constitutes a single gift, with the result that the donee cannot disclaim the house, retaining the contents, *Rogerson v. Joel*, (1945) 1 Ch. 811 (U.A.).

106. [Suc. S. 93] If a legacy is given to two persons jointly, Legacy does not lapse if one of them dies before the testator, the other die before testator. legatee takes the whole.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy. *Buffer v. Bradford*, 2 Atk. 220. Cf. (1945) 2 M.L.J. 194.

N. B.—This section applies to Hindus etc.

Bequest to joint Legatees:—Where a bequest is made to two joint legatees, and if one of them dies before the testator, his interest does not lapse, but the surviving legatee takes the whole bequest, [*Krishnadas Tulsi das v. Dwarkadas Kaliandas*, 38 Bom. L.R. 829—A.I.R. 1936 Bom. 459—cited at p. 209]. Joint legatees take as if they are in the eye of law one person. They are joint tenants with the right of survivorship as between themselves, and such right of survivorship prevents lapsing. See *Arkel Joseph v. Domingo*, 34 Mad. 80 : (1910) M.W.N. 74 : 6 I.O. 7 ; *Mosley v. Bird*, 8 Ves. 629 : Cf. *Bhaba Tarini v. Peary Lal*, 24 Cal. 646 : 1 C.W.N. 878 ;

Jairam v. Kuberbai, 9 Bom. 491; *Bai Mamubai v. Dassa Morarji*, 15 Bom., 448; *Re Schoffield Baker*, (1918) 2 Ch. 64; *Powell v. Hellicar*, (1919) 1 Ch. 198; *Ex parte Turner*, 20 Beav. 374; *Westminster Bank v. Garrison*, (1989) 3 All E. R. 657 (Ch. D.). The Oudh Court has, however, held that a bequest to the testator's widow and daughters-in-law without any specification of their shares, does not, by reason of the non-specification of the shares alone, give rise to a joint tenancy, *Denkal v. Ram Jag.* 8 O.W.N. 1008 = A.I.R. 1981 Oudh, 421 - 184 I.C. 1103. The Lahore Court also has held that where property is bequeathed to two or more persons jointly, they take as tenants-in-common, *Devidas v. Nizam Din*, A.I.R. 1927 Lah. 278 = 100 I.C. 949. Various shades of opinion have been maintained in other Courts regarding this subject, for which see the notes under the heading "When the bequest is or is not given jointly," post. The word "two" is not used in its arithmetical sense but only signifies a plural number, see *Re Clarkson*, (1915) 2 Ch. 216; *Morley v. Bird. Supra*; *Re Ward*, (1920) 1 Ch. 334; similar is the case with the number "one." It is to be so understood as to leave one or more survivors. For other cases see *Leigh v. Leigh*, 17 Beav. 605; *Re Rhodes*, 29 Ch. D. 142. For an exception to this rule, see sec. 107: *infra*. When a testator bequeathed his property to his daughter and his sister's son, whom he intended to take as illatom son-in-law, but the sister's son, that is, the intended husband of the daughter died before the marriage could take place, the Court held that the two legatees took as tenants-in-common, and not as joint tenants, because the marriage was not a condition precedent to the intended husband or the sister's son taking the bequest, *Venkata Krishnayya v. Vassreeds Madamma*, A.I.R. 1928 Mad. 926 - 112 I.C. 255. Where after creating a life-estate in favour of the widow, the remainder was vested jointly in the daughter and the son-in-law, the latter two took as tenants-in-common transmitting her or his share to her or his own heirs, *Siddappaji v. Nonjappaje*, 6 Mys. L.J. 301; *Mt. Jio v. Mt. Rukuran*, 8 Lah. 219 - 28 P.L.R. 78 = A.I.R. 1927 Lah. 126 = 100 I.C. 54.

Failure of legacy otherwise than by death:—From the use of the word "die" it is not to be understood that this section contemplates only death as the agency to bring about partial failure of the bequest. There may be other circumstances as well, *vide* notes under sec. 105 at p. 210, *ante*; also *Humphrey v. Tayleur*, Amb. 198; *Nandi Singh v. Sitam*, 16 I.A. 44 : 16 Cal. 677 (generally cited under sec. 24 of the Transfer of Property Act). *Vide* also *Camani v. Barefoot*, 26 Mad. 493; *Re Bulter*, (1918) 1 Ir. R. 394; *Re Coleman*, 4 Ch. D. 165.

When the bequest is or is not given jointly:—*Prima facie* when a grant is made for maintenance of two persons, they do not take as joint tenants, but proportionately to their interests and therefore no question of survivorship arises upon the death of one, *Mathura v. Rukmini*, 17 C.L.J. 87; *Hirabai v. Lakshmisai*, 11 Bom. 573; *Jogeswar v. Ram Chandra*, 23 Cal. 670 (*contra*, 11 Mad. 268); *Re Ward* (1920) 1 Ch. 334. But this principle will not apply if there be indications of

a contrary intention, and then the bequest may be taken as a joint gift, *Hemanta Kumar v. Sudhansu*, 25 C.W.N. 262. *Vide also Mathura v. Rukmini, supra.* Where property is given jointly to two persons living as joint members, each donee takes an interest which passes to his heirs on death and not to survivor, *Bas Devait v. Patel*, 26 Bom., 445. Cf. *Naoroji v. Perozbas*, 28 Bom. 80; *Administrator General v. Money*, 15 Mad. 448. Likewise, it has been said that property which comes to members of an undivided family by devise they do not take it with the benefit of survivorship, *Karuppayya v. Narayan Chettu*, 27 Mad. 350. But when the testator uses distinct words providing that in the event of the death of one legatee, his or her share would go to the other, the legatees will take in equal shares with the benefit of survivorship, *Radha Prasad Mullick v. Raneemoni*, 55 I.A. 118 : 85 Cal. 896 : 12 C.W.N. 729 : 8 C.L.J. 48 (P.C.). When the bequest is by specifying shares, the principle of joint tenancy does not hold good. See see. 107 *infra*. Thus, a Hindu in a certain contingency left his property to his two brothers-in-law in equal shares, held they took as tenants-in-common, *Hari Prasad v. Kunwar*, 33 All. 247 ; see also *Issaki Ammal v. Muthuswami*, (1913) M.W.N. 604 : 20 I.C. 692. The principle of joint tenancy is not very much in favour in this country, *vide* *Jojeswar's case supra*, and even bequests without specification of shares have been held to create only tenancy in common, *Gope v. Jaludhar*, 33 All. 41 ; *Kishore Debia v. Mundra*, 33 All. 665 ; *Buchibabu v. Nagpur*, I.L.R. (1946) Nag. 433 = A.I.R. 1946 Nag. 379. Cf. 28 All. 88 ; *Venkata Krishnayya v. Vassireddi*, A.I.R. 1928 Mad. 926 = 112 I.C. 255. Thus, a gift to wife and her children by the testator was held to make the legatees as tenants-in-common, and the wife was held incompetent to represent the children in any litigation so as to bind the children's interest by the result of such representation, *Krishna Menon v. Devu Amma*, (1941) 2 M.L.J. 287 = A.I.R. 1942 Mad. 86 = 201 I.C. 301. The natural presumption in this country is in favour of tenancy in common and against joint tenancy, *Yethirajulu v. Naidu*, 28 Mad. 363. Cf. 27 Mad. 498 and *Gopaladas v. Hemandas*, I.L.R. (1942) Kar. 392 = A.I.R. 1942 Sind. 146 = 208 I.C. 210 ; also *Mt. Jio v. Mt. Rukuran*, 8 Lab. 219 = 28 P.L.R. 79 = A.I.R. 1927 Lab. 126 = 100 I.C. 64. Of course no question of survivorship arises where the legatees take as tenants-in-common, *Parakkal v. Parakkal*, (1916) 1 M.W.N. 190 : 33 I.C. 968.

107. [Suc. S. 94] If a legacy is given to legatees in words

Effect of words showing testator's intention to give distinct shares. which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Illustration

A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would

have had if A had survived the testator.

N. B.—This section applies to Hindus etc.

Bequest by specification of Shares:—This section provides that when the bequest to several legatees is by specification of shares, the principle of joint tenancy enunciated in the last section will not apply. *Vide* notes above; also *Administrator-General v. Money*, 16 Mad. 448, and the other cases cited under sec. 106, *supra*. Specification of shares implies severance of interest, and therefore precludes the application of the legal fiction of *single* ownership which is the very foundation of the doctrine of joint-tenancy with its incident of survivorship. The Courts generally lean in favour of tenancy-in-common, *Joliffe v. East*, 3 Bro. C.C. 25. Compare the cases above, which show that such leaning is all the more marked with our Indian Courts; read *Smith v. Smith*, 29 S.L.R. 374 = A.I.R. 1936 Sind, 168 = 164 I.C. 889.

'In words etc.'—This shows that there should be express mention of or reference to specific shares to be given to the different legatees.

Effect of such Specification:—The effect is that when a legatee dies, his share does not go by survivorship, but lapses and falls into the residue of the testator's property, *vide Re Moore's Trust*, 81 L.J. Ch. 368.

108. [Suc. S. 95] Where a share which lapses is a part of
When lapsed share goes the general residue bequeathed by the will, that
as undisposed of. share shall go as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

N. B.—This section applies to Hindus etc.

Lapsed Share in General Residue:—We have already seen that where the Legacy is of specific property, if it fails, it lapses into the residue; and this section provides that when such legacy is a share in the residue, itself, it goes, upon lapsing, as undisposed of residue to the heirs as on intestacy, see *Skrymsher v. North Cole*, 1 Sw. 566 (570); *Palmer v. Ainsworth*, (1893) 3 Ch. 369; *Lloyd v. Lloyd*, 4 Beav. 231; *Administrator-General v. Lazar Stephen*, 4 Mad. 244; *Vedabala Debi v. Official Trustees of Bengal*, 62 Cal. 1062 = 39 C.W.N. 1154. In the case of 4 Mad. 244, the testator bequeathed one moiety of the residue to

the wife of an attesting witness. Such a bequest being void under sec. 67, *supra*, was dealt with as undisposed of residue. Comp. *Kistamal v. Saraswati Bai*, (1908) 2 M.L.J. 1010—1988 M.W.N. 1162—A.I.R. 1939 Mad. 112—179 I.C. 749. See also *Re Jones, Johnson v. Attorney-General*, (1925) 1 Ch. 340, in which the entire beneficial interest in the testator's property was given to his wife, who however, predeceased him, and such beneficial interest, in absence of next-of-kin, escheated to the Crown.

"Go as undisposed of":—It means that the lapsed share of a residue goes as on intestacy to the heirs of the testator : Cf. *Chia Khwee v. Chia Po*, 83 M.L.T. 212 (P.O.) ; *Kistamal v. Saraswati Bai*, *supra*. But as the testator cannot alter the line of intestate succession [see *Tagore v. Tagore*, 9 B.L.R. 377, *Purna Sashi v. Kalidhan*, 38 Cal. 603 : 15 C.W.N. 693 : 14 C.L.J. 1 : 8 A.L.J. 681 : 18 Bom. L.R. 461 : (1911) 2 M.W.N. 403 : 21 M.L.J. 1119 : 11 I.C. 412 (P. C.) ; *Madan Lal v. Labhu Ram*, (1922) Lah. 421 : 67 I.C. 481. Cf. 4 Bom., 587] such undisposed of property will go to them even if he declares that some of them will not get any property. *Johnson v. Johnson*, 3 Beav. 318 ; in the case of a residuary gift to a class, if the gift to one member of the class, be subsequently revoked, such revoked share does not go as undisposed of residue but enures for the benefit of the remaining members of that class, *Re Dunster*, (1909) 1 Ch. 103 ; *Re Bitlance*, 42 Ch. D. 42 ; also *Skrymsher's case*, *supra*. Cf. sec. 111, *infra*. Where a residuary bequest made by a testator in favour of a trust fails for uncertainty, there will, by reason of this section, be a resulting trust to the heirs of the testator. *Vedabala Devi v. Official Trustee of Bengal*, 62 Cal. 1062—39 C.W.N. 1164.

109. [Suc. S. 96]. Where a bequest has been made to any child or other lineal descendant of the testator,

When bequest to
testator's child or lineal
descendant does not
lapse on his death in
testator's lifetime.

and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son, B, for his own Absolute use and benefit. B dies before A, leaving a son, C, who survives A. and having made his will whereby he bequeaths all his property to his widow, D. The money goes to D.

N. B.—This section applies to Hindus &c. It corresponds to sec. 88 of the English Wills Act with a slight modification. In this section we have the words

"lineal descendants" instead of "issue" occurring in the English Act.

The Rule in this Section:—Like sec. 106, *supra*, this section provides an exception to the general rule about lapsing of legacy by reason of the legatee's death during the testator's life-time. It says that where a bequest is made to a child or other lineal descendant of the testator, and such legatee dies in the lifetime of the testator leaving descendants who survive the latter (i.e., the testator), the bequest will not lapse, but will pass on as the disposable property of the deceased legatee, *Re Parker*, 1 Sw. & Tr. 523; *Johnson v. Johnson*, *supra*. Though the legatee dies in the life time of the testator, still the law by a fiction contemplates that such legatee has died after the testator, with the result that he is supposed to have taken a vested interest in the property which then descends to his heirs, *Re Parker*, *supra*; *Johnson's case*, *supra*. So, such heirs or descendants do not come in in their own right, but in the right of their ancestor, the deceased legatee, see *Jitu Lal v. Binda Bibi*, 16 Cal. 549 Cf. *Ramarathan v. Ranganathan*, 24 Mad. 299; *Shama Churn v. Khetromoni*, 27 Cal. 526. "The effect of the section is to prolong the original legatee's life by a fiction for a particular purpose", *Jarmen on Wills*, 4th Ed. 364. Or, in other words, the effect of this section is to give the deceased legatee absolutely as if he had survived the testator, Cf. *Re Horne's Trust*, 22 C.D. 663; *Pickersgill v. Rodger*, 5 C.D. 163; *Be Hensler*, 19 C.D. 612. Thus, a testator gave a legacy to his son's daughter J, who died in the lifetime of the testator leaving K a child, who survived the testator, *held*, J in the contemplation of law under this section, was in existence at the time of the testator's death, because her descendant K survived, *Jitulal v. Binda Bibi*, *supra*. Although to make the legal fiction contemplated by the section operative and to prevent lapsing it is necessary that some lineal descendant should survive the testator. The section does not lay down that upon such fiction being applied the benefit of the bequest is confined to the lineal descendants only and is not extended to the other heirs, *Mohammad Yakub Khan v. Aziz-un-nisa*, 1935 O.W.N. 881=A.I.R. 1935 Oudh, 437=155 I.C. 1076. The word "child" in this section includes a child in the womb, Cf. *Tagore v. Tagore*, 9 B.L.R. 377; 18 W.R. 359, and with reference to Hindu Law, an adopted child, see Restriction No 5 of Schedule III, but it will, not include an illegitimate child, unless there is a *designatio personae*. *Jagadish Chandra v. Ras Pada Dhal*, A.I.R. 1941 Pat. 458=196 I.C. 66. A sister's daughter of a testator governed by the Marumak-kathayam tarwad is not a child or other lineal descendant within the meaning of the section, so as to entitle her to claim a legacy in favour of her mother, when the latter died during the lifetime of the testator, *Shreedharan v. Bharathi Nambishtathiri*, 4 D.L.R. (Coch) 189.

A Contrary Intention:—The rule of this section does not apply if there be a contrary intention appearing in the will, *vide Jitulal v. Binda Bibi*, 16 Cal. 549. Thus, a bequest was made to a "daughter and her sons from generation to generation." The legatee predeceased the testator leaving daughters (and not sons).

The words within inverted commas were held to mean simply heirs and this section did not apply. *Ramarathan v. Ranganathan*, 24 Mad. 299. Cf. *Ramasami v. Kuppusami*, 13 M.L.J. 361.

110. [Suc. S. 97] Where a bequest is made to one person for Bequest to A for benefit the benefit of another, the legacy does not lapse of B does not lapse by by the death, in the testator's lifetime, of the A's death. person to whom the bequest is made.

N.B.--This section applies to Hindus etc.

Bequest for Benefit of another person :—Herein we have another exception to the rule about lapsing. This section says that when a bequest is made to a person for the benefit of another, there is no lapsing by the legatee's death; so it has been held that where a bequest is made to a person as a trustee for another person, the legacy will not lapse by the death of the trustee in the testator's lifetime. *Bates v. England*, 2 Vern., 468; or, in other words, a bequest to *Cestus que trust* will not fail by the trustee's death; Cf. *Oke v. Heath*, 1 Ves. Sen., 134; *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Wirley*, 2 Atk. 605; but the position may be different, if the gift to the trustee be revoked or addeemed, the reason being that this section contemplates only the case of trustee's death in the testator's lifetime, and not such contingencies as revocation or ademption. *Couper v. Mantell*, 22 Beav. 223. The converse position of this section also holds good, viz., a gift to trustee will not be rendered void by the death of the *cestui que trust* before the testator, *Doe v. Edlin*, 4 Ad. & E. 682.

111. [Suc. S. 98] Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

- (i) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, C, D and E. E. died after the date of the will, but before

the death of A. C and D survive A. The legacy will belong to C and D, to the exclusion of the representatives of E.

(ii) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D, and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E, his executor. D has survived A. D and E are jointly entitled to so much of the leasehold term as remains unexpired.

(iii) A sum of money was bequeathed to A for her life, and after her decease, to the children of B. At the death of the testator, B had two children living, C and D, and, after that event, two children, E and F, were born to B. C and E died in the lifetime of A, C having made a will, E having made no will. A has died, leaving D and F surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E and one to F.

(iv) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that event another sister E was born. C died during the life of B. D and E have survived B. One-third of A's lands belong to D, E and the representatives of C, in equal shares.

(v) A bequeaths 1,000 rupees to B for life and after his death equally among the children of C. Up to the death of B, C had not had any child. The bequest after the death of B is void. [See *Chapman v. Blisset*, Cas. Temp. Talbot, 145; *Wyndam v. Wyndam*, 3 Bro. C.C. 68].

(vi) A bequeaths 1,000 rupees to "all the children born or to be born" of B to be divided among them at the death of C. At the death of the testator, B has two children living, D and E. After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F and G, to the exclusion of the after-born child of B. [See *Ayton v. Ayton*, 1 Cox. 887].

(vii) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C. He afterwards had two other children, named D and E. E died, but C and D were living when C attained majority. The fund belongs to C, D and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority.

N. B.—This section applies to Hindus &c. It is subject to Restriction No. 5 of Sch. III. Read *Viswanadhan v. Anjaneyalu*, 1935 M.W.N. 1119 = A.I.R. 1935 Mad. 865 = 158 I.C. 1083.

Amendment:—The original section 98, of the Succession Act of 1865, which is reproduced here contained the following illustration : Illus. (b):—A bequeaths a legacy to the children of B. At the time of the testator's death, B has no children. The bequest is void"; but it has now been omitted. "We have omitted Illustration (b) as it might give the impression that a child in the womb is excluded which is not the existing law"—Notes on Olauses with the Joint Committee Report.

Gift to a Class:—This section makes provision for a bequest to a class and lays down the incidents of such a bequest. It says that when a bequest is made to a class of persons, then those members of the classes, who are alive at the testator's death take the gift. Or, in other words, if any member of the class predeceases the testator his interest will not fall into the residue by lapse, but will pass on to the remaining members of the class by SURVIVORSHIP. Primarily, the class should be ascertained with reference to the date of the testator's death; but the EXCEPTION to the section provides for the case when such ascertainment of the members of the class is deferred to a later date (than the testator's death) because of a provision putting off possession or enjoyment of the thing bequeathed to a future time (after the testator's death), (i) by means of a condition superadded, or (2) by interposing prior life-estates; vide *Ramlal Sett v. Kanhas Lal*, 12 Cal. 668 (669, 679). Cf. *Bishen Chand v. Asmadia Koer*, 11 I.A. 164 : 6 All. 560; *Srinivasa v. Dandayudapani*, 12 Mad. 411; *Whitebread v. John*, 10 Ves. 152; *Re Mervin*, (1891) 3 Ch. 197; *Re Emmet's Estate*, L.R. 13 Ch. D. 484. The principle of this section applies even when the gift to class is not directly made by the testator, but is made under, or in exercise of a power of appointment granted by the testator. *Paul v. Compton*, 8 Ves. 375; *Javerbai v. Kabilbai*, 16 Bom. 326 (also 16 Bom. 492).

The most important question in relation to such gifts, is at what time the class is to be ascertained. The body of the section says that in case of an immediate gift, it is to be ascertained at the testator's death and all the members of the class living at that date will share the gift. See *Javerbai v. Kabilbai*, 16 Bom. 326 (16 Bom. 492); *Viner v. Francis*, 2 Cox. 190; *Re Powell*, (1898) 1 Ch. 227; *Re Metcalfe*, (1901) 1 Ch. 424; *Re Wilson*, (1907) 2 Ch. 672; *Re Lambert : Coons v. Harrison*, (1908) 2 Ch. 117; *Barracough v. Cooper*, (1908) 2 Ch. 121 (b); *Bowden v. Griffiths*, (1909) 1 Ch. 385; *Sayler v. Baker*, (1916) 2 Ch. 418; *Re Hickey*, (1917) 1 Ch. 601; *Re Knapp's Settlement*, (1895) 1 Ch. 91. No question of remoteness will arise in such a case. If the ascertainment of the class is deferred to a later date those who become members of the class within the extended period are admitted, subject to the rule of

perpetuity. Cf. *Hutchinson v. National Refugees*, (1920) A.C. 784. Any member dying in the testator's lifetime is excluded, see illus. (1) above, so is the person born after the date of ascertainment, *Aylott's case, supra*; *Sprackling v. Ranier*, 1 Dick 344; *Stewart v. Sheffield*, 18 East, 526; *Re Coleman*, L.R. 4 Ch. D. 167; the excluded member's share does not lapse but goes by survivorship to the rest. Any member dying between the testator's death and the above extended period, i.e. during the incumbency of the intervening life-estate, takes a vested interest. If the gift to one member is revoked, the rest of the class take the whole by survivorship, *Shaw v. McMahon*, 4 Dr & W. 431. If one member forfeits his share by attesting the will (sec. 67), he is excluded and the rest take the whole, *Young v. Davies*, 2 Dr. & S. 167; *Fell v. Biddolph*, L.R. 10 C.P. 701. In a gift to a class the testator looks to the body as a whole, rather than to the members constituting the body as individuals; if some of the class are incapable of taking, then those of the class who are capable of taking at the time of distribution are entitled to the whole gift, whatever their number be, *Advocate-General v. Karmali*, 29 Bom., 133. Likewise, it has been said that where there is an intention to give two named persons capable of taking and there was also an intention that other persons unborn should also share therin the part of the gift which is capable of taking effect should be given effect to although the intention could not be carried out in its entirety, *Ramlal Sett v. Kanailal Sett*, 12 Cal. 668. See also *Gordhan Das v. Bai Rani*, 26 Bom., 449. A similar view was taken in the leading case of *Bhagabati Barmanya v. Kalicharan*, 38 Cal. 468; 16 C.W.N. 393 (P.U.) [on appeal from 82 Cal. 992 : 9 C.W.N. 749]. Cf. *Leake v. Robinson*, (1817) 2 Mer. 369. Before the passing of the Hindu Disposition of Property Act (XV of 1816), a gift to an unborn Hindu was invalid, and considerable controversy was raised in relation to Hindu wills over the claims of those members of the class who were not born during the testator's lifetime, but in view of the provisions of the above Act validating a gift to an unborn Hindu, the old controversy and many of the cases thereon have ceased to have any practical importance for us. See the following important cases with respect to gift to a class under Hindu Wills—*Alangam-njori v. Sonamoni*, 8 Cal. 697, (also 8 Cal., 167); *Callynath v. Chunder-nath*, 8 Cal. 878; *Rudhaprosad Mullick v. Banimcn*, 38 Cal 188; 16 C.W.N. 118 : 18 C.L.J. 183 (affirmed on appeal to P.C. 20 C.L.J. 548); *Haridas Chatterjee v. Saroj Kumar Chatterjee*, 44 C.W.N. 214. The Madras Court has held that this section should not be applied to Hindu vernacular wills, *Mamkan Pellai v. Venkatesa Chetty*, A.I.R. 1927 Mad. 494-99 I.C. 705.

Gift partly immediate and partly postponed:—When the gift is partly immediate and partly postponed for the purpose of ascertaining the time of distribution, the gift is to be taken as immediate for the purposes of this section, vide *Hill v. Chapman*, 3 Bro. C.C. 391.

What is a Class:—Literally the word class means a group of persons, uncertain in number, designated by a common description. When a gift is made to a

class, the number of its members will be ascertained with reference to the exact moment, when the gift in their favour becomes operative. Cf. *Kingsbury v. Walter*, (1901) A.C. 187; and read the notes at p. 198, under the heading, "Bequest to a class". A class will none the less be a class, though some of its members be named *Re Stanhope*, 27 Beav. 201: *Re Jackson*, 26 Ch.D. 162. If the testator intended the legatees to take as a class, they would take as such a class even though they do not come within one general description, *Revenn Linden v. Ingram*, (1904) 2 Ch. 52; also *Re Czerns*, (1903) 1 Ch. 198; *Sherer v. Bishop*, 4 Bro. C.C. 55; *Barber v. Barber*, 9 My. & Cr. 688.

Application of the Section:—Whether the gift to class takes effect immediately on the testator's death or after the termination of the intervening life-estates, the members of the class if surviving the testator take a vested interest (which is heritable and transmissible), *vide* notes at p. 220, *ante*. So it has been held that this Section applies only to vested interest, *Maseyk v. Fergusson*, 4 Cal. 670.

Ascertainment of Class:—(1) When the gift is immediate, *vide* notes at p. 220, *ante*. (2) When the gift is deferred, (a) by reason of intervening life-estates—the class will be determined at the termination of the prior bequests, *vide* the EXCEPTION, and also *Middleton v. Messenger*, 5 Ves., 136; *Walker v. Shore*, 15 Ves., 122; *Ramal Sett v. Kanhai Lal*, 12 Cal. 663: *Pestonji v. Khurshedbhais*, 7 Bom. L.R. 207; *Advocate-General v. Karmali*, 29 Bom. 199. So all members coming into existence before the determination of the prior bequests will share the legacy, *Andrews v. Partington*, 3 Bro. C.C. 401; *Re Winn, Brook v. Whitton*, (1910) 1 Ch. 278; *Re Mellish*, (1916) 1 Ch. 582, or at any rate should have in it a vested interest, which is transmissible, *vide Radhaprasad Mullick's case* at p. 220, *ante*.

The operation of a bequest to a class may be deferred by the interposition of prior bequests as shown in the Exception or is deferred by a condition superadded, by attaching conditions to the bequest itself putting off possession or enjoyment of the legacy to a future date. For instance, where the distribution of the legacy, is by a condition in the bequest itself, postponed until the members of the class attain a particular age or a certain event happens, any member coming into existence before the first member attains that age or that particular event happens, will get the legacy or at any rate a vested interest in it, see *Andrews v. Partington*, 5 Bro. C.C. 401; *Hughes v. Hughes*, 3 Bro. C.C. 352: *vide* also illus. (vii), *supra*. Thus, where a testator left his estate to trustees directing them to divide the estate among his brother's children when they would attain a particular age or marry, it was held that any brother's child born before the period of distribution would participate in the gift, *Maseyk v. Fergusson*, 4 Cal. 670.

Child en ventre sa mere:—In ascertaining the members of the class under this section, a child in the womb is taken into consideration as a person *in esse*, *vide*

the reason given by the Legislature for omitting illustration (b) in *Notes on Clauses, supra* [at p. 219]; see also *Okkoymoney v. Nilmony*, 15 Cal. 282; *Villar v. Gilbey*, (1906) 1 Ch. 688; but see *Re Salaman v. Sonnenthal*, (1908) 1 Ch. 4 (C.A.).

Exception:—*Vide* the notes and the cases at p. 219; also *vide supra*.

CHAPTER VII

OF VOID BEQUESTS.

112. [Suc. S. 99] Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.
B equest to person by particular description, who is not in existence at testator's death.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

Illustrations.

(i) A bequeaths 1 000 rupees to the eldest son of B. At the death of the testator, B has no son. The bequest is void. [Cf. *Nakshetramal Dei v. Braja Sunder Das, infra*].

(ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

(iii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(iv) A bequeaths his estate of Green Acre to B for life, and at his decease, to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(v) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son, but a son is afterwards born to him during the life of B and is alive at B's Death. C's son is entitled to the 1,000 rupees.

N.B. — This section applies to Hindu etc.; it is subject to Restriction No 5 of Sch. III. Notice that the section is subject to the general restriction of said Sch. III, *Nakshetramali Dei v. Brajasunder Das*, 12 Pat. 708 = A.I.R. 1983 Pat. 647 = 146 I.C. 865. This section is applicable only in so far as it does not contravene any rule of Hindu Law. See *Ram Lal v. Kanailal*, 12 Cal. 668; *Nafer Chandra v. Ratan Mala*, 16 C.W.N. 66 (70): 13 C.L.J. 85; also *Dinesh Chandra Roy v. Biraj Kamini Dasi*, 39 Cal. 87; 15 C.W.N. 945 (952) 14 C.L.J. 20.

Bequest to an Unborn Person: — In the first place the section says that a bequest to a person not actually or presumptively born before the testator's death is void. *Karsandas v. Lankavahu*, 12 Bom. 185; *Alangamongors v. Sonamons*, 8 Cal. 637 (also 8 Cal. 167); *Tagore v. Tagore*, 9 R.L.R. 377; 18 W.R. 369; *Sri Rajah v. Sri Rajah*, 31 Mad. 810; Cf. 21 Bom. 709 (P.C.); 16 Bom. 492; *Nakshetramali Dei v. Brajasunder Das*, 12 Pat. 708 = A.I.R. 1983 Pat. 647 = 146 I.C. 865. Then it makes an *Exception*, the purport whereof is that where a bequest is made to particular relations of a particular individual, but the operation of such bequest is made subject to prior bequest or fulfilment of some contingency, it will suffice if the designated legatees come into existence before the date of such operation: they will then take the bequest or at any rate have a vested interest in it. Thus, a bequest in favour of the future wife of the testator's son will be valid if the wife (that is taken) was in existence at the time of the testator's death. *Nafer Chandra v. Ritan Mala*, *supra*. Cf. *Blout v. Crozier*, (1917) 1 Ir. R. 461; *Benode Behari v. Nistarans*, 33 Cal. 180: 9 C.W.N. 96: 2 C.L.J. 189; *Mahomed Shah v. Official Trustees*, 36 Cal. 431: A.I.R. 1955 T.C. 177. A life estate to an unborn person is invalid, see *Devi Prasad v. Krishna Kunwar*, 4 O.W.N. 1041 = 104 J.C. 847 and the notes under sec. 113, *post*, at p. 225, *infra*.

Distinction between void and lapsed Bequests: — A void legacy is invalid from the very beginning, it is altogether inoperative, and takes effect only as on intestacy. A lapsed legacy (under sec. 106) is not a nullity *ab initio*; only a subsequent event renders it incapable of taking effect. The distinction is however more academical than practical.

Exception : Deferred Gifts: — It contemplates the case where possession or enjoyment of the bequest is postponed till a future date, and makes a concession in favour of the intended legatee, vide notes under the heading, "Bequest to an Unborn Person" *supra*. Also see the illustrations (ii), (iii) and (iv) above and A.I.R. 1955 T.C. 177. Notice that the effect of the *Exception* is not to suspend a bequest

Indefinitely, *Nakshetramali Dei v. Brojashunder Das, supra.*

To his Representatives:—This shows that in case of deferred gifts once the intended legatee is found in existence either at the testator's death or sometime during the extended period, he will take a vested interest in the gift, which will descend to his heirs in the event of his subsequent death before the actual moment when the gift in his favour can possibly operate. It should be noticed that this Exception shows a concession and implies a relaxation of the rule in the body of the section in the case of deferred gifts.

Kindred:—The word "kindred" in the Exception, in so far as it applies to Hindu wills, should not be interpreted in the strict sense of the English Law as defined in sec. 24, *ante*, as that section has not been extended to Hindu Wills (*vide* sec. 23, *ante*), and should not be limited to blood relations when the word is imported in a Hindu will, *Dinesh Chandra Roy v Biraj Kamens*, 39 Cal. 87; 16 C.W.N. 945 (1950); 14 C.L.J. 20; 11 I.C. 57; under the English law relations by affinity (such as husband and wife) are not included in the term *kindred*, see *Watt v. Watt*, 9 Ves. 244; *Garrick v. Lord Camden*, 14 Ves., 372; and other cases cited under sec. 24, *ante*; but it would be different under the Hindu Law. Cf. *Bhyah Ram v. Bhyah Ugar*, 18 M.I.A. 373.

113. [Suc. S. 100] Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Bequest to person not in existence at testator's death, subject to prior bequest.

Illustrations.

(i) Property is bequeathed to A for his life, and after his death to his eldest son for life and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(ii) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters some of whom were not in existence at the testator's death. The bequest to A's daughter comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughter is valid.

(iii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life: that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

N. B.—This section is applicable to Hindus &c., and is subject to Restriction No. 5 of Schedule III. In sec. 19 of the Transfer of Property Act (IV of 1882), we have a similar provision. The English law is also to the same effect, see *Hay v. Earl of Coventry*, 8 T.R. 88; *Whitely v. Michell*, 44 Cb. D. 86.

Transfer to unborn person subject to prior Bequest:—Under the last section we have seen that a bequest can be made to an unborn person, subject to a prior bequest, if such person comes into existence before the termination of the prior bequest, sec. 112, *supra*. This section provides a further limitation to a bequest in favour of such an unborn person. It says that the testator *must* give to such unborn person *all that remains* after the prior bequest. So a mere life-estate cannot be bequeathed to an unborn person. [Read *Kuppuswami Pillai v. Jayalokshmi Ammal*, 58 Mad. 16-67 M.L.J. 626-1934 M.W.N. 468-40 L.W. 570-A.I.R. 1934 Mad. 705-164 I.C. 537; also *Damodara Moothan v. Ammu Amma*, (1943) 2 M.L.J. 832-(1943) M.W.N. 554-A.I.R. 1944 Mad. 22-211 I.C. 258]. Similarly, it has been held that a bequest to an unborn person subject to a prior bequest is void unless it was an absolute gift of the remainder. *Alangamnenji v. Senamoni*, 8 Cal. 157 (also 8 Cal. 637). Under the Hindu Law, formerly a gift to an unborn person was held to be invalid, with the consequence that the principle of this section could not be extended to Hindus; *Sri Raja Venkata v. Raja Surwani*, 31 Mad. 810; but after the passing of the Hindu Disposition of Property Act (XV of 1916), a gift can

be made to an unborn Hindu, subject to the limitations of secs. 13 (corresponding to this section), 14 and 20 of the Transfer of Property Act, (IV of 1882); the effect of this is that the application of this section to Hindus cannot now be left out of consideration. Cf. 31 Mad. 310, *supra*; also see *Radha Prosad Mullick's case*, 88 Cal. 188 : 15 C.W.N. 113 : 18 C.L.J. 188 (affirmed on appeal to P.C., 20 C.L.J. 348). Also *Aniruddha Mitra v. Administrator-General of Bengal*, 76 I. A. 104 = 59 C.W.N. 667 = 1949 A.L.J. 317 = 61 Bom. L.R. 971 = (1949) 2 M.L.J. 85 = 1949 M.W.N. 365 = A.I.R. 1949 P.C. 244, (P.O.); also 47 Bom. L.R. 911 = A.I.R. 1946 Bom. 184; *Satyabhama Bai v. Pushpalata Bai*, I.L.R. (1964) Nag. 815 = 1954 Nag. L.J. 497 = A.I.R. 1954 Nag. 279. The invalidity of a bequest resulting from this section cannot be cured or prevented by Act viii of 1921, *Kuppuswami Pillai v. Jayalakshmi Ammal*, *supra*. The words, 'a prior bequest, do not render the section inapplicable to a case where there are more than one prior bequest; no inspiration can be drawn from the illustrations to warrant the view that the section is inapplicable in the case of a plurality of prior bequests, *Damodara Moohan v. Annu Amma*, *supra*. The words "the whole of the remaining interest etc." mean the testator's remaining interest in an unfettered form. So, where the bequest to an unborn person is fettered by a contingency or a defeasance clause, there is no compliance with the requirements of this section, *Sopher v. Administrator-General of Bengal*, 71 I. A. 93 = 48 C.W.N. 585 = I.L.R. (1945) 1 Cal. 1 = 46 Bom. L.R. 665 = (1944) 2 M.L.J. 20 = 1944 M.W.N. 467 = 1944 A.L.J. 404 = A.I.R. 1944 P.C. 67 = 216 I.C. 68 (P.O.). Postponement of possession does not delay the vesting and does not effect the question whether or not the whole or entire interest has been given to the unborn person, *Aniruddha Mitra v. Aralindra Mitra*, 60 C.W.N. 634 = A.I.R. 1946 Cal. 396 = 228 I.C. 401.

114. [Suc. S. 101] No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

- (i) A fund is bequeathed to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the life-time of A and B and the minority of the sons of B. The bequest after B's death is void.

(ii) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

N. B.—This section is applicable to Hindus etc., and is subject to Restriction No. 5 of Schedule III. It corresponds to sec. 14 of the Transfer of Property Act (IV of 1882), and also to sec. 12 of the Oudh Estates Act. For the application of the rule of Perpetuities among Hindus, see *Kumara Asima v. Kumara*, 2 B.L.R. O.O. 11; *Colgan v. Administrator-General*, 15 Mad., 424; *Tagore v. Tagore*, 9 B.L.R. 377 : 18 W. R. 359. The rule of this section is not to be applied to Hindu wills made before the Hindu Wills Act of 1870 came into force, *Dakshayani v. Amritalal*, 23 C.W.N. 826 : 53 I.C. 779. Cf. *Soundararajan v. Natarajan*, 44 Mad. 446 : 10 M.L.J. 854 : (1921) M.W.N. 210 : 29 M.L.T. 210 ; 18 L.W. 662 : 62 I.C. 987. (on appeal to P.C., 52 I.A. 310—48 Mad. 906—48 C.L.J. 70—30 C.W.N. 434—A.I.R. 1926 P.C. 244—92 I.C. 289 (P.C.). The rule of this section has to be applied in the light of the Hindu Disposition of Property Act, *Aniruddha Mitra v. Arabinda Mitra*, 50 C.W.N. 634—A.I.R. 1946 Cal. 896—228 I.C. 401. It is possible for the life-estate holder to assign or devise his interest so as to accelerate the ultimate absolute estate, A.I.R. 1956 Punj. 146.

Rule of Perpetuity:—The object of this rule is to remove the inconveniences arising from excessive restraints and restrictions on the power of alienation of the grantee by preventing the grantor from postponing the vesting of the property for an indefinitely long period. *Kamini Deb v. Ashutosh Mookherji*, 15 I.A. 169 ; 16 Cal. 103 ; *Maseyk v. Ferguson*, 4 Cal. 804. As it prevents the deferring

of vesting of interest till a very remote period, the rule is also called the Rule against Remoteness or the doctrine of Remoteness. Cf. *Re Garnham Taylor v. Baker*, (1916) 2 Ch 413. The section provides that the vesting of a property cannot be delayed beyond the life-time of persons in existence at the testator's decease and the minority of some person unborn at the testator's decease, but born before the determination of the prior bequests, who, when of full age, will take the bequest. Thus, where an estate was given to testator's daughters for their lives with remainder to their children on attaining 21, the whole bequest in favour of the children was held to be invalid inasmuch as there was no certainty as to the age of minority being postponed from 18 years to 21 years in every case, *Soundara Rajan v. Natarajan*, 52 I.A. 810 = 48 Mad. 906 = 1926 M.W.N. 22 = 48 C.L.J. 70 = 80 C.W.N. 434 = 28 Bom. L.R. 204 = A.I.R. 1926 P.C. 244 = 92 I.C. 289 (P.C.); *Soundarajan's* case (44 Mad. 446 : etc), *supra*. In simple language the above rule may be summed up thus—"Except in the case of minority, there must be no interval between the determination of the preceding interests and the vesting of the interest in the person unborn at the testator's death, but subsequently born," vide *Fatima v. Advocate-General*, 6 Bom. 42; *Limji Nowroji v. Bapuji*, 11 Bom. 41; *Official Assignee of Madras v. Vadavalli Thayirammal*, 51 M.L.J. 182 = A.I.R. 1926 Mad. 936 = 97 I.C. 168. Thus, a property is left to a person absolutely with a direction that it should not be handed over to the legatee until he has attained a certain age *beyond minority*, the direction should be ignored and the legatee will get the property immediately on attaining majority—otherwise there will be a forbidden intermediate period, *Kutty Amma v. Vasudevan*, I.L.R. (1945) Mad. 828 = (1944) 2 M.L.J. 297 = 57 L.W. 547 = A.I.R. 1945 Mad. 6 = 219 I.C. 906. Cf. *Dakshayani v. Amritalal*, 28 C.W.N. 826; 63 I.C. 779. This Rule is not a mere rule of construction, but is an inflexible rule prohibiting deferring of vesting of interest beyond the limit herein definitely fixed. A bequest where the vesting is delayed beyond this period is void. Cf. *Duke of Norfolk v. Howard*, 1 Vern. 160. Likewise, the testator wanted to limit the enjoyment of the property for an indefinite period the gift was held to be void, *Putlibai v. Sorabji*, 45 M.L.J. 780 : (1928) M.W.N. 626 : 25 Bom. L.R. 1099 : A.I.R. 1928 P.C. 122; *Shookmoy v. Monohari*, 12 I.A. 103 : 11 Cal. 864; *Lalit Mohun v. Chukkun Lal*, 24 I.A. 76 : 24 Cal. 834; *Anandrao v. Administrator-General*, 20 Bom., 450; *Ward v. Vander Looff*, (1924) A.O. 653. Evidently, the Rule of Perpetuity does not apply where vesting is not delayed beyond the life time of a living person, *Re Grotian*, (1905) 1 All. E.R. 788.

To create an "estate tail," i.e., an estate given to a man and the heirs of his body is to tie up the property and put it out of commerce, see *Tagore v. Tagore*, *supra*; [also *Soundararajan's* case, *supra*]. If estate-tail can be created there are no means by which the entails can be barred; and thus perpetuities might be created and the free sale and disposition

of property prevented" [vide *Tagore's case*] ; also the cases cited above. A bequest of Rs. 10 per month to the legatee and after his death to his descendants "from generation to generation" is, for the same reason, invalid, *Arumugam v. Anni Ammal*, 1 M.H.C.R. 400 : but see *Gumani v. Debiprosanna*, 28 C.W.N. 1028. (N.B.—In this case the legatee's heirs who claimed the annuity through the legatee were all born during the testator's life-time). Even when the words of a

In applying the Rule of Perpetuity, regard is to be had to possible and not to actual events.

deed are such that they might possibly, though not actually,

delay such vesting beyond the limit fixed in this section, that mere possibility will vitiate the bequest. Or, in other words,

in determining whether a gift is good or bad under this section, regard is to be had to possible and not to actual

events. For instance, a devise is made to A (a bachelor) for life and then to his wife for life and the remainder to other persons ; the gift is invalid ; because it is possible that A should marry a wife who was not born at the testator's death ; that is, it is possible that an unborn person will take a mere life interest and not all that remains. This mere possibility will vitiate the whole devise though in actuality in particular cases A's wife may not be an unborn person at the testator's death ; see *Dungannon v. Smith*, (1846) 12 Cl. & F. 546 ; *Re Bullock's Will*, (1915) 1 Ch. 493 ; *Jee v. Andley*, (1787) 1 Cox 324 ; *Soudamincy v. Jogesh Chander*, 2 Cal. 262 (268) ; *Bramamayi v. Jogesh Chunder*, 8 B.L.R. 400 (407) ; *Nabin Chandra v. Rajani Chandra*, 25 C.W.N. 901, also *Re Atkinson*, (1916) 1 Ch. 91 ; *Re Davey, Frisk v. Mitchell*, (1915) 1 Ch. 887 ; *Re Beavan's Trusts*, 84 Ch. D. 716. As to how far this English principle of deciding on mere possibilities and not on actualities can be acted upon in relation to Hindu Wills, see *Bhagabati v. Kalicharan*, 88 Cal. 468 : 15 C.W.N. 393 (on appeal from 82 Cal. 992, F.B.). A Hindu testator directed his executor to divide the residuary estate into five shares, he having had five sons, he having had five sons, and to give away the same to his grandsons in the cases of sons with male issue, when the grandsons would attain their age. Held, the disposition is invalid, *Subramania v. Murugesa*, 17 C.W.N. 488 ; 21 I.O. 282 (P.C.). The rule against Perpetuities does not affect interests which have already vested, *Re Turney*, (1899) 2 Ch. 789 ; as to the question of perpetuity in relation to charitable bequests, vide infra. The rule also applies to gifts made in the exercise of power of appointment, see *Re Thompson*, 1906, 2 Ch. 199 ; or gifts subject to trusts. Cf. *Re Wood*, 2 Ch. 881 ; *Goodier v. Edmund*, (1898)

"Pre-emption."

2 Ch. 455. A covenant for pre-emption is subject to the rule of perpetuity, *Nabin Chandra v. Rajani*, 25 C.W.N. 601 ; *Swarna Kumar v. Prohlad*, 26 C.W.N. 874 ; but there is a contrary opinion also in the matter, see *Basdeo Rai v. Jhagru*, 46 All. 333 ; also read 44 C.L.J. 220. Now it has been held that a right to ask for reconveyance of property granted (i.e. right of pre-emption) may be enforced not only against the contracting party but also against his heirs [*Ali Hossain v. Raj Kumar*, 77 C.L.J. 216-47 C.W.N. 667 (T.B.)]. An agreement never to divide property is void as tending to create a perpetuity, *Khanapuri v. Khanapuri*, 7 Bom., 638. A gift does not fail in *toto*, simply because some

of the directions in it are offending against the rule against perpetuity, *Rameshwari v. Lachman*, 81 Cal. 111 : 7 C.W.N. 688. As to direction in will for repairs of grave of the testator, see *Administrator General v. Hughes*, 40 Cal. 192 : 21 I.C. 189. As to the application of the law of perpetuity in a colony, see *Fatima Bibi v. Advocate-General*, 6 Bom. 42. For other cases on the subject, see *Kaleloda v. Nussuruddin*, 18 Mad. 201; *Kashinath Chimanji v. Chimanji*, 80 Bom. 477; *Soorjeemoney Dasi v. Denobundho*, 9 M.I.A. 123; *Kristolomoni v. Narendra Krishna*, 16 Cal. 889; *Watson v. Ram Chandra*, 18 Cal. 10. A bequest to four persons with direction to them that they are to keep the property as *farward* is void as creating perpetuity. *Meherwan Jehangir v. Dhunbhai Kavaska*, (1940) 1 M.L.J. 918—1940 M.W.N. 569—A.I.R. 1940 Mad. 785.

The thing bequeathed:—Includes both moveable and immoveable property, *Cowasji v. Rustomji*, 20 Bom. 511.

Minority:—Under the English law, the additional period or the interval during which the vesting can be suspended is put as 21 years and not as minority as hereunder. So in *Cadell v. Palmer*, 1 Cl. & F., 372 the question was raised "whether in the case of executory devises the additional period of 21 years must relate to the actual minority of the person concerned or whether it was a term in gross, i.e., a term of 21 years from the death of the last life in being, irrespective of the minority of any particular person?" and it was decided that the term was to be taken in gross. But the tendency of the later English cases is to confine the additional period to the minority of the person intended to take, so that it may be equal to any number of years up to 21 plus the term for gestation; *Edwards v. Edwards*, (1909) A.C. 275; *Re Chappard*, 35 C.D. 350; *Cooper v. Larche*, 17 Ch. D. 868; *Hughes v. Hughes*, 14 Ves., 266. Under this Act (as under the T. P. Act) this controversy has been avoided by using the word *minority* instead of 18 or 21 years, *vide* Mookherji's *Law of Perpetuities*, pp. 89-49.

Bequests to Charity:—*Vide* notes under sec 118 (*infra*). Charitable trusts though made in perpetuity are not within the mischief of this section provided the vesting is not delayed beyond the statutory period and there is no remainder over. In fact this section puts fetters on interests arising in *futurs* only and does not bother itself with gifts in *presentis* to trustees for a charitable object although in perpetuity, *Mariano v. Provost*, 1941 Rang. L.R. 410—A.I.R. 1941 Rang. 806—197 I.C. 462.

Direction for Repairs of Testator's Grave:—A direction in a will that the trustees should look after and keep in repairs the graves of himself, his wife and his children is not a charity but a perpetuity and therefore void, *Administrator-General v. Hughes*, 40 Cal. 192 : 21 I.C. 188, *supra*.

115. [Suc. S. 102] If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be void in regard to those persons only and not in regard to the whole class.*

Illustrations.

(i) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death; and in regard to those who do not attain the age of 25 within 18 years after A's death; but inoperative in regard to the other children of A.

(ii) A fund is bequeathed to A for his life and after his death to B, C, D and all other children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in Illustration (i). Although the mention of B, C and D does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children B, C or D, who attains the ages of 25 within 18 years after A's death.

N. B.:—This section applies to Hindus etc., and is subject to Restriction No. 5 of Schedule III. It corresponds to sec. 15 of the T. P. Act.

What is a Class:—*Vide notes at pp. 193, 219 and p. 221, supra.*

Gift to a Class:—*Vide notes at pp. 164 and 221, supra.*

Effect of the failure of a bequest to a class in respect of some members of the class because of Secs. 113 & 114:—Before the amendment of 1929, the section provided on the authority of *Leake v. Robinson* (1817) 2 Mer. 363, that when a bequest to a class failed in respect of some members of that class by reason of the provisions of secs 113 & 114, the bequest would fail with respect to the whole class. The reason for this rule was that a contrary view would split up the transfer and make it valid with respect to some persons of the class and invalid as to the rest and that would be making a disposition which the transferor never intended. Read in this connection the following cases, *Dungannon v. Smith* 12 Cl.

* Substituted by Act XXXI of 1929, sec. 14, for "wholly void".

& F. 575; *Rojomoyee Dassi v. Troylukho Mohini*, 29 Cal. 260 = 6 C.W.N. 267; *Bramamayi v. Jogesh Chandra*, 8 B.L.R. 400; *Soudamoney v. Jogesh Chandra*, 2 Cal. 212; *Kherodmoni v. Dorgamoney*, 4 Cal. 455; *Tathan v. Vernon*, 22 Beav. 604. The rule in *Leake v. Robinson*, is an extremely artificial rule of construction (*Ram Lal v. Kanai Lal*, 12 Cal. 663) and scarcely found any favour in this country and has often been sought to be distinguished on the slightest pretexts, see *Bhagabati v. Kalicharan*, 82 Cal. 992, F.R.—affirmed by the P.C. in 88 I.A. 54 = 88 Cal. 468 = 15 C.W.N. 398. Also *Rai Bishen Chand v. Mstmt. Asmaida Kcer*, 11 I.A. 164 = 6 All. 560, P.C.; *Radha Prasad v. Ranimoni*, 38 Cal. 188—affirmed by P.C. in 41 I.A. 176. In these cases the rule in *Leake v. Robinson*, was avoided by the plea that the partial failure of the gift resulted not from the Rule against Perpetuity but from the personal incapacity of unborn Hindus to take any interest. Consult *Krishnath v. Atmaram*, 15 Bom. 543; *Mangaldas v. Tribhubandas*, 15 Bom. 652; *Anandrao v. Vinayak*, 20 Bom. 460; *Marjamamma v. Padmanabhayya*, 12 Mad. 398. When the personal incapacity of unborn Hindus was removed by the Hindu Disposition of Property Act and the sister Acts of Madras, it became possible for a bequest to members of a class to fail because of the rule against Remoteness with the consequence that the rule in *Leake v. Robinson*, became applicable in full force to it. This happened in *Soundara Rajan v. Natarajan*, 52 I.A. 910 = 48 Mad. 906 = 43 O.L.J. 70 = 30 C.W.N. 494 = 28 Bom. L.R. 204 = (1926) M.W.N. 22 = A.I.R. 1925 P.C. 244 = 92 I.C. 289, P.C. [N.B. In this case the estate was given to the testator's daughters for their lives with remainder to their children on attaining 21; but as minority was not necessarily prolonged from 18 to 21 in every case, by reason of a guardianship appointment, the whole gift failed, i.e. it failed even in respect of the living children. But the natural aversion for *Leake v. Robinson*, has led the Legislature to declare that partial failure of the bequest by reason of secs. 113 & 114 will not render the whole bequest invalid. In this way, the mischievous consequence of *Soundararajan's* case has been averted. Cf. *Muhusami v. Kalyani*, 40 Mad., 818; *Aniruddha Mitra v. Arabinda Mitra*, 50 C.W.N. 694 = A.I.R. 1946 Cal. 396. It is necessary for the applicability of this section that partial failure should result from contravention of secs. 113 & 114. The words of this section are sufficiently wide and do not in any manner limit its application to the members of a class who are in existence at the date of the testator's death; Illus. (i) hereof does not restrict the meaning of the section, *Aniruddha Mitra v. Administrator-General of Bengal*, 76 I.A. 104 = 59 C.W.N. 667 = (1949) 2 M.L.J. 95 = 1949 M.W.N. 365 = 1949 A.L.J. 317 = 61 Bom. L.R. 971 = A.I.R. 1949 P.C. 244 (P.C.).

116. [Suc. S. 103] Where by reason of any of the rules contained in sections 113 and 114, any bequest in

Bequest to take effect on failure of prior bequest. favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will, and

intended to take effect after or upon failure of such prior bequest, is also void.

Illustrations

(i) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the deceas of such son to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25, which bequest is void under section 114. The bequest to B is void.

(ii) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25. and, if no son of A shall attain that age, to B. A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons as shall first attain the age of 25, which bequest is void under section 114. The bequest to B is void.

N. B.—This section applies to Hindus etc.; and is subject to Restriction No. 5 of Schedule III. It corresponds with section 16 of the Transfer of Property Act (IV of 1882). The section has reached its present form by reason of the amendment (of 1929) introduced in consequence of the far-reaching effect of the present sec. 115.

The Principle of the Section :—This section says that where a bequest is to take effect on the failure of a prior bequest, and if the prior bequest fails by reason of sections 113, and 114, the ulterior bequest also fails. Thus, a bequest is made to A for life and then to A's son (unborn) for life, and then to the son of A's son; here the gift to A's unborn son would fail, as not comprising the entire interest of the testator (sec. 113); therefore the subsequent bequest to A's grandson also fails; *vide* also *Cambridge v. Rous*, 8 Ves. 12; *Re Thatcher's Trusts*, 26 Beav. 365; *Re Eldridge*, (1915) 1 Oh 810; *Javerbai v. Kablibai*, 16 Bom. 492 (also 16 Bom. 826); *Brojonath v. Anandmoyi*, 8 B.L.R., O. C. 208; *Re Abbott*, (1898) 1 Ch. 67.

Limitations to the Section :—This section does not apply (a) unless the prior bequests fail by reason of the provisions of secs 113, 114. Thus, in *Ajudhia v. Rukmin*, 10 Cal. 182, (a case of alienation *inter vivos*), the prior interest failed for want of registration under the Oudh Estates Act (I of 1869), the subsequent interest did not fail on that account. Cf. also *Radha Prasad Mullick v. Rani Moni*, 38 Cal. 947; (b) it does not also apply unless the ulterior bequest follows the prior bequest, i.e. it takes effect after or upon failure of the prior bequest. So, if the subsequent gift be in the alternative or substitutional, this section has no application, *Javerbai v. Kablibai*, *supra*; compare *Brojonath's case*, *supra*; *vide* also *Watson v. Young*, 28 Ch. D. 486; *Hodgson v. Holford*, 11 Ch. D. 969; *Re Thatcher's Trusts*, *supra*.

In case of alternative limitations, the Court will disregard the invalid one, and give effect to the other, *Longhead v. Phelps*, 2 W.B. 704 and the cases cited above. Cf. *Ismail v Umar*, A.I.R. 1942 Bom. 155-201 I.C. 84.

117. [Suc. S. 104] (1) Where the terms of will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

Effect of direction for accumulation.

(2) This section shall not affect any direction for accumulation for the purpose of—

- (i) the payment of the debts of the testator or any other person taking any interest under the will, or
- (ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or
- (iii) the preservation or maintenance of any property bequeathed;

and such direction may be made accordingly.

N.B.—This section does not apply to Hindus etc. It owes its origin to the "Thellusson Act." 32 & 34 Geo. III, C. 98, and corresponds to S. 17 of the Transfer of Property Act. Cf. Sec. 41 of the Trusts Act, (II of 1682).

Direction for Accumulation:—The arguments against accumulation are primarily three in number : (i) It keeps ownership in abeyance, which is contrary to the elementary principle that a property should never remain without an owner, (ii) It puts restrictions on free enjoyment of property ; (iii) It might infringe the rule against perpetuities, *Vide Asima Krishna v. Kumara Krishna*, 2 B.L.R. (O.C.J.) 11; *Comp. Mokoondo v. Ganesh*, 1 Cal. 104; *Bramanoyi v. Jagesh*, 8 B.L.R. 400; *Bissoyath v. Birsa Soondery*, 12 M.I.A. 41. On these considerations, formerly a direction for accumulation was allowed for a period of one year only from the date of the transfer. In England the Thellusson Act allowed accumulation for a much longer period and in certain cases the restrictions against accumulation was not applicable at all. Thus, that Act allowed accumulations for the payment of

debts and for providing funds for children. Accumulations are also allowed in English Law for maintaining property in good repair [(1891) 2 Ch. 18]. By subsequent Acts more exceptions were added to the rule enacted in the Thellusson Act; see secs. 164-66 of the Property Act, 1925 (15 Geo. V, c. 20). These liberal ideas in favour of accumulation gradually came to influence the judicial opinion in India and it came to be held here that if there was nothing *per se* illegal in a direction to accumulate, and if such direction was neither so unreasonable in its conditions as to be against public policy, nor given for the purpose of carrying out an illegal object, the direction should be given effect to; see 24 Cal. 5. Likewise, it was again said that a direction to accumulate with a gift of the accumulations is not fundamentally bad; it only fails if it offends against some independent rule of Hindu Law; see 47 Cal. 88, 98-Footnote. In certain cases, as a matter of fact, a Hindu has been held competent to direct accumulation under certain circumstances; see *Amritolal v. Surnamoyi*, 24 Cal. 589. The Legislature has now come to accept the more liberal view in the matter and to permit accumulation for a period of 18 years from the date of death of the testator. A direction for accumulation in excess of 18 years is not altogether void, but fails only in respect of the excess period. Sub-sec. (2) altogether abolishes the restriction against accumulation in relation to (1) provisions for the payment of the debts of the testator or the legatee, or (ii) provisions raising portions for children of the testator or the legatee, or (iii) provisions for the preservation or maintenance of the property bequeathed.

What is not direction for Accumulation:—A direction that no payments are to be made except to the persons mentioned was not a direction to accumulate and so is valid, *Administrator-General v. Hughes*, 40 Cal. 192: 21 I.C. 189.

English Law of Accumulation:—The English law on the point is much wider in scope than the rule in this section, *vide* the Thellusson Act, referred to above. The Indian law as enacted herein having made a departure from the English law, the latter has ceased to be of any great practical utility for us, and so we do not deal with the English cases *in extenso*, but only incidentally mention the following important cases, *Mathews v. Keble*, 3 Ch 691; *Re Hawkins, White v. White*, (1916) 2 Ch. 570; *R. Pope, Sharp v. Marshall*, (1901) 1 Ch. 64; *Re Garside, Wragg v. Garside*, (1919) 1 Ch. 182.

Hindu Law on Accumulation:—This section not applying to the Hindus, the Hindu Law on the subject has been held not to be affected by the provisions hereof, Cf. *Amritolal v. Surnamoyi*, 24 Cal. 589: 1 C.W.N. 345 (also 25 Cal 662: 27 I.A. 128: 27 Cal. 896). Thus, a direction to accumulate till the boy to be adopted attained his 16th year was held to be valid, *Jamnabai v. Dhasay*, 4 Bom. L.R. 893. Likewise, a direction to accumulate the income for the marriage expenses of an unmarried son and to give the property to the future wife of that son is valid, *Nafar Chandra v. Ratan Mala*, 15 C.W.N. 66; 7 I.C. 921; *Sreeranga-*

Thanni v. Baba Vaithilinga, 40 M.L.J. 532 : (1921) M.W.N. 248 : 29 M.L.T. 281 : 18 L.W. 392 : 68 I.C. 104. Though a Hindu will is unaffected by this section, still in certain cases, the principle hereof has been applied to cases of Hindu wills on grounds of expediency and public policy, see *Nistarini Dasi v. Nundo Lal*, 80 Cal. 869 (on appeal, 88 Cal. 180); *Amritlal's case, surra*; *Sookhomoy v. Monohari*, 7 Cal. 269 (also 11 Cal. 684); *Krishna Kamini v. Ananda Krishna*, 4 B.L.R. (O.C.J.), 281; *Callynath v. Chunder Nath*, 8 Cal., 878; whether a direction for accumulation in a Hindu will offends against public policy or is lawful is to be determined according to the circumstances of each case, *Rajendra v. Raj Oomari*, 34 Cal 5.

Accumulation for Charity:—Requests for charitable purposes not being subject to the rule against perpetuities, it seems that such bequests are exempted from the operation of this section. Cf. *Harbin v. Masterman*, (1894) 2 Ch. 184; *Ramanadhan v. Vava Levoni*, 34 Mad. 12 (affirmed on appeal to P.O., 44 I.A. 21 : 40 Mad. 116 : 25 C.L.J. 224 : 21 C.W.N. 621). But see *Martin v. Morgham*, 14 Elm. 280.

Exception:—Under this EXCEPTION, accumulation is permissible in two cases, (1) where the property is immoveable, or (2) where accumulation is directed to be made from the date of the testator's death. In the former case, the period of accumulation may or may not begin to run from the date of the testator's death, but at all events it should end within one year from that date. In the other case of moveable property such period must begin to run from the testator's death and end within one year therefrom. From illus. v, it will appear that the exception will not cover cases of directions for accumulation

Accumulation during minority or for payment of debts. till they attain majority. Cf. *Bissonath v. Boma Soondry*, 12 M.I.A. 41 (6!). *Re Cuttell*, (1907) 1 Ch. 567; *Re Hanover*,

(1907) 1 Ch. 635; *Bateman v. Hotchkin*, 10 Beav., 426; *Ganapathy Pillay v. Alamatoo*, (1929) A. O. 462—27 A.L.J. 1075 (P.O.)

118. [Suc. S. 105] No man having a nephew or niece or any

Bequest to religious or charitable uses. nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

Illustrations.

A having a nephew makes a bequest by a will not executed and deposited as required—

for the relief of poor people;
for the maintenance of sick soldiers;

for the erection or support of a hospital ;
 for the education and preferment of orphans ;
 for the support of scholars ;
 for the erection or support of a school ;
 for the building and repairs of a bridge ;
 for the making of roads ;
 for the erection or support of a church ;
 for the repairs of a church ;
 for the benefit of ministers of religion ;
 for the formation or support of a public garden ;

All these bequests are void.

N. B.—This section does not apply to Hindus etc. It owes its origin to the English Mortmain Act, (9 Geo. II, C 36). Sec. 20 of the Oudh Estates Act (1 of 1869) has made provisions somewhat similar to those of the present section limiting the powers of Oudh Taluqdars to make charitable bequests.

Object and applicability of the Section :—Is to prohibit death-bed bequests to charity where the testator has very near relations : *vide Williams On Executors*, 11th Ed pp 814, *et seq* : *Jarman on Wills*, 6th Ed. pp. 212, *et seq*. The section, however, does not prevent a testator with near relatives from making a charitable bequest ; it has simply enacted a safeguard against the making of such a disposition in the event of death being imminent. *Mariano v. Prevost*, 1941 Rang. L. R. 410 = A.I.R. 1941 Rang. 305 = 197 I.C. 452. This section is inapplicable to a bequest which is not *in trust* or not *to any use* ; so it is inapplicable to a *free gift*, which does not involve any element of trust. There may be a free gift to a company or to a society, as much as to a private individual. Law does not make any distinction in this respect. No trust can be implied or inferred from the mere fact that the articles and memorandum of association of a limited company impose or involve certain action or function which the donor may expect to be carried out by the donee, and the gift will still have to be taken as a free gift to the company. Similarly, a bequest to a society "for all or any of the purposes of the said society" will be a free gift. All such gifts being denuded of the element of trust, stand unhit by this section, *Halfhyde v. Saldanha*, I.L.R. (1945) 1 Cal. 592 = 49 C.W.N. 145 = A.I.R. 1949 Cal. 588—relying on *Bowman v. National Secular Society, Ltd.*, [1917] A.C. 406.

Hindu Law :—This section not applying to the Hindus, a Hindu's power to make a charitable bequest is not limited hereby ; but such power is subject to the provisions of sec. 89, *supra* : *vide* the following cases in this connection, *Fanindra Kumar's case, infra* : *Kendarpa v. Jogendra*, 12 C.L.J. 391 ; 6 I.C. 141. *Shyama Charan v. Surup*, 17 C. W. N. 39 : 14 I.C. 708. *Prasolla Chandra's case, infra*, *Gordhan Das v. Chunni Lal*, 30 All. 111 ; *Monoroma v. Kally Churn*, 32 Cal. 166.

Requisites of the Section:—(1) In order to be able to make a chairabé bequest in an unqualified manner, the testator must have no nephew, nor niece, nor any nearer relative; (2) if he has any of them, his will must be executed at least 12 months before death (see *Administrator-General v. Money*, 15 Mad. 418, and (3) must be deposited within six months from its execution in some place of safe custody (as required by this section). Read *Bai Cursetbai v. Bai Hamabai*, 45 Bom. L.R. 598 = A.I.R. 1943 Bom. 317 = 209 I.C. 178. It is necessary that the deposit should continue till the death of the testator, *Edalji v. Dhanji Sha*, 60 Bom. L.R. 137 = A.I.R. 1948 Bom. 304. Cf. *Abdul Razak v. Amir Haidar*, 10 Cal. 976; *Mariano v. Provost*, *supra*. If the will is withdrawn from its place of safe custody as contemplated herein, the effect will be not to render the will void altogether, but to oblige observance of the requirements of the section as to duration of deposit and time of execution once again, *Ibid.* As to the necessity of deposit to make the bequest valid, read A.I.R. 1956 Mad. 412. It seems that the presence of uncles and aunts will not deter the testator from making any charitable bequests, because, though they are of the same degree as a nephew or niece, they are not nearer relatives than such nephew or niece. Mere registration is not equivalent to deposit within the meaning of this section. The section is not inapplicable to contingent bequests, *Bai Cursetbai v. Bai Hamabai*, *supra*, or to a gift of part estate, *Alexius Jacob v. Dr. Alfred*, 6 D.L.R. (Bom.) 163.

Relatives:—As the Act contemplates only relations born out of lawful wedlock, such relatives (as well as the nephew or niece) must be legitimate ones, *Smith v. Massey*, 30 Bom. 600. Cf. *Administrator-General v. Simpson*, 26 Mad. 582.

Bequest to Religious and Charitable Uses:—Under this section a bequest to charity cannot be made by a testator, if he has a nephew or niece or any nearer relative, except in the manner provided in this section. Where there are no such relations as aforesaid, the testator has unrestricted power to make bequests in favour of Charity. A later will modifying but not putting an end to the legacies contained in a former will may not offend against this section, *Elizabeth Anna v. Official Trustee of Bengal*, 52 C.L.J. 475 = A.I.R. 1991 Cal. 188 = 190 I.C. 217. The What is charity. Act does not say what is CHARITY, and leaves it entirely

to the discretion of the Court to determine what will or will not be a charitable use. The English Statute, 43 Eliz. C. 4, has specified a good many charitable objects, which may be consulted in this connection; *vids also Prafulla Chandra v. Jogendra Nath*, 1 C.L.J. 605 : 9 C.W.N. 628; *Commissioners of Income Tax v. Pemsel*, (1891) A.C. 531 (680); *Gordhan Das v. Chunnilal*, 30 All. 111; *Governors of Charity v. Sutton*, 27 Beav. 651; *Re Christ Church*, 38 Ch. D. 520; *Re Macduff*, (1896) 2 Ch. 96; *Re Norwich Town Charity*, 40 Ch. 298; *Re Wall*, 42 Ch. D. 510. Broadly speaking, the following are Charitable or religious objects, (1) relief of the aged, or the poor, or sick & maimed person, orphans etc. *Re Ma'lody Brandwood*, (1918) 1 Ch. 228; *Baldwin v. Baldwin*, 22 Beav. 418.

(2) advancement of learning, e.g. by founding schools, colleges, scholarships etc., *Berumont v. Oliveira*, 4 Ch. 309. (3) advancement of Religion, e.g. by establishing religious institutions, or by erecting temples, churches etc. *Douglas v. Simpson*, (1905), 1 Ch. 297; (4) other purposes, beneficial to the community. *Re Webster*, (1912) 1 Ch. 106; *Grimond v. Grimond*, (1906) A.C. 124; *Attorney-General v. Blizzard*, 21 Beav. 239; *Attorney-General v. Simpson*, 26 Mad. 582; *Broughton v. Mercer*, 14 B.L.R. 442; *Re Foreaux*, (1895) 2 Ch. 501; *Mc Loughlin v. Attorney-General*, (1906) 2 Ch. 184. In short, any purpose that benefits the world at large and is not for the private benefit of the donor or his family or his particular nominees, is a charitable purpose, see *Colgan v. Administrator-General*, 15 Mad. 424; *Elkins v. Oullen*, 18 N.L.R. 51: 40 I.O. 791. Cf. also *Re Sidney*, (1908) 1 Ch. 488; *Verge v. Somerville*, (1924) A.C. 496; *Re Chapman : Habs v. Attorney-General*, (1922) 1 Ch. 287; *Fanindra Kumar v. Administrator-General*, 6 C.W.N. 391; *Parbati Bibee v. Rambaran*, 31 Cal. 895; *Smith v. Massay, supra*; *Malcus v. Broughton*, 19 Cal. 193; *Gordon v. Craigie*, (1907) 1 Ch. 382; but see *Hummeltenberg*, (1923) 1 Ch. 297. A bequest to a Church Dignitary comes under this section, *Alexius Jacob v. Dr. Alfred*, 6 D.L.R. (Bom.) 163. As to whether a patriotic purpose will be a charitable one, see *Attorney-General v. National, P. & U. Bank*, (1924) A.C. 262; (1923) 1 Ch. 258 [following (1902) A.C. 97 and (1918) A.C. 397]. A bequest for contribution towards the marriage of the daughters of the poor or of poor Brahmins and towards the education of the sons of the poor and so forth is a valid charitable bequest, *Dwarkanath v. Burroda Persaud*, 4 Cal. 443. Cf. *Profulla Chandra's case, supra*. Bequests for superstitious uses, though not countenanced Superstitious uses. in England are allowed in this country, *vide Fatmabibi v. Advocate-General*, 6 Bom. 42; *Andrew v. Joakim*, 2 B.L.R. (O.O.) 148; *Judah v. Judah*, 6 B.L.R. 433; also 15 Mad. 424 (*ante*). Where a testator for his own spiritual benefit made a religious endowment by granting a *britti* (allowance) to the wife of his spiritual guide and for *sheba* of a temple, the bequest would be valid without giving to any body, any beneficial interest apart from the question of spiritual benefit of the testator, so that when the question of spiritual benefit of the testator would disappear the endowment will terminate and the property would revert to the heirs of the testator, *Bishnu Charan Sen v. Radhabhusan*, 58 C.L.J. 328.

The essence of a charitable bequest is that it must be for public benefit.

So, a bequest given in private charity (*vide* 15 Mad. 424) or What are not charitable bequests. for the erection of a private tomb or monument (*Fowler v. Fowler*, 39 Beav. 616; *Re Richard*, 31 Beav. 244) is not a

charitable bequest and is subject to the rule against Perpetuity, *vide Joseph Henry v. Administrator-General*, 46 Cal. 485: 47 I.O. 388; likewise, a direction in a will that the trustees should look after and keep in repair the graves of the testator, his wife and his child has been held not to be a charity but to be a perpetuity and therefore void, *Administrator-General v. Hughes*, 40 Cal. 192: 21 I.C. 188. A

bequest for masses for the benefit of the testator's soul is not a charity. *Colgan v. Administrator-General*, 15 Mad., 424; but see A.I.R. 1956 Mad. 412. So a trust created for the benefit of poor relations and members of testator's family is not a subject of charity, (1955) 8 All. L.R. 689. A bequest is not necessarily a charitable bequest, simply because it is philanthropic or benevolent. *Re Jarman's Estate*, 8 Ch. D. 584; *Elkins v. Cullen*, 18 N.L.R. 51 : 40 I.C. 791; a bequest for encouragement of sport is not charitable, *Re Nottage*, (1896) 2 Ch. 649; that is the case also with respect to a gift for an annual treat, *Re Mellody Brandwood, supra*, or to a gift to an establishment for entertaining distinguished foreign visitors, or to a gift of premises for the purposes of annual meetings of scientists, *Watt v. Bridges*, (1949) 1 Ch. 332. But a gift for the promotion of sport among soldiers is a valid charitable gift, *Todd v. Taylor*, (1926) Ch. 362. For the instance of a family settlement under the guise of a religious endowment, see *Mulchand Hazarimal v. Hassomal Bachomal*, 31 S.L.R. 197 = A.I.R. 1937 Sind, 177 = 171 I.C. 127.

Doctrine of Cypress :—This doctrine has a very important bearing on the question of charitable bequests. The doctrine means that where there is a general intention to give to Charity, the gift does not fail merely because the testator has not definitely named his object; the Court will carry into effect the intentions of the testator by pointing out a suitable object to which the gift is to be applied. Where there is a general charitable intention apparent in a will, and not a special intention to benefit any particular institution, the doctrine of *Cypress* is applicable, *Advocate-General v. Belchambers*, 36 Cal. 261; *Long-bottom v. Sattoor*, 1 Mad. H.C.R. 429; *Malchus v. Broughton*, 13 Cal. 193 (St. Paul's School case); *Abdul Sattar v. Abdul Hamid*, (1944) 2 M.L.J. 92 = 1944 M.W.N. 505 = A.I.R. 1944 Mad. 604 [Doctrine of *Cypres* applied]. See *Biscoe v. Jackson*, 35 Ch. D. 460; *Re Mann*, (1909) 1 Ch. 292; *Grimond v. Grimond*, (1906) A.C. 124. Where the suggested scheme is not materially divergent from the scheme outlined in the will, the Court will allow the same on the doctrine of *Cypres*. *Radha Govinda v. Nalini Mohan*, 46 C.W.N. 106. But where the Court names a new object by applying this doctrine, the new object must be in the nature of the original object of the testator, *Re Prison Charities*, (1873) L.R. 16 Eq. 129; Cf. also *Re Pyn*, (1903) 1 Ch. 88; *Gelabhai v. Uderam*, 36 Bom., 29; *Re Wills*, (1921) 1 Ch. 42 (C.A.). The doctrine may be applied also in cases where the testator leaves the object to the choice of another person by virtue of a power of appointment, but such person does not make any appointment, *White v. White*, 1 Bro. C.C. 12; for other cases on the doctrine, see *Re Pack Sanders*, (1918) 1 Ch. 437; *Re Campden Charities*, (1881) 18 Ch. D. 310; *Re H. F. Warden*, 82 Bom. 214; *Malchus v. Broughton*, 13 Cal. 193 (on appeal from 11 Cal. 591); *Mayor of Lyons v. Advocate-General*, 1 Cal. 803. The doctrine cannot be applied unless it is shown that the original intentions of the testator cannot be carried out, *Re Weir Hospital*, (1910) 2 Ch. 124; the Court has no right to set aside the avowed or ascertained intentions

When the doctrine
does not apply.

of the testator, *Advocate-General v. Fardoonji*, 18 Bom. L.R. 882 : 11 I.C. 365. The Court has no jurisdiction to apply the doctrine *extra territorium*, *Kanji v. Advocate-General*, 18 Bom. L.R. 60 : 32 I.C. 925 ; but compare, *Hardy v. Attorney-General*, (1903) 1 Ch. 282 ; it cannot be also applied unless there is a general charitable intention, *Fowler v. Attorney-General*, (1901) 2 Ch. 1 ; *Attorney-General v. Bishop of Oxford*, 1 Bro. C.C. 144 (n) : *Elkin v. Cullen, supra* ; where the intention of the testator was to make a gift to religious uses, the Court cannot invoke the doctrine to apply the gift to a non-religious object, *Re Avenon's Charity*, (1913) 2 Ch. 261. Where the gift lapses by reason of the fact that the institution wanted to be benefited by the testator has ceased to exist, the doctrine cannot be called in aid to apply the legacy for the benefit of some other institution, *Re Rymer*, (1895) 1 Ch. 19 ; *Biscoe v. Jackson, supra* ; also *Clark v. Taylor*, 1 Drew., 642. Read in this connection the notes and cases under the heading, "Gift to charity not void for uncertainty," at p. 174, ante. As to the tests of practicability and certainty to be applied in relation to the doctrine, see *Re Tacon*, (1958) 2 W.L.R. 66.

CHAPTER VIII.

OF THE VESTING OF LEGACIES.

119. [Suc. S. 106] Where by the terms of a bequest the

Date of vesting of legacy when payment or possession postponed. legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(i) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy. [Cf. *Kolla Subramaniam v. Thellunayakulu*, 4 Mad. 124].

(ii) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

(iii) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

(iv) A fund is bequeathed to A until B attains the age of 18 and then to B. The legacy to B is vested in interest from the testator's death.

(v) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

(vi) A fund is bequeathed to A, B and C in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vested in interest in A, B and C, subject to be divested in case A, B and C shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives. [See *Maseyk v. Fergusson*, 4 Cal., 804].

N. B — This section applies to Hindus etc. It corresponds to sec. 19 of the Transfer of Property Act.

Scope of the Section:—This section provides for the vesting of legacies, enjoyment or possession whereof is deferred till a future period. So, it cannot apply where the legatee is given immediate possession, *Asit Kumar v. Provash Chandra*, I.L.R. (1949) 1 Cal. 298. The whole section is subject to the limitation that no contrary intention should appear from the will. Under the EXPLANATION clause, no inference of such contrary intention is to be made from the fact that payment or possession of the legacy is postponed by a particular provision or by the interposition of a life-estate or by a direction to accumulate. As to a direction for accumulation not standing in the way of vesting, see *Ganapathy Pillai v. Alimaloo*, (1929) A.O. 462 = 27 A.L.J. 1075 (P.C.).

Vesting of Deferred Gifts:—We have seen at p. 207, ante, under sec. 104, that when a legacy is given in general terms, it vests on the date of the testator's death. This section provides for the case where the legatee is not entitled to immediate possession of the thing bequeathed [*Re Campbell*, 88 L.J. Ch. 289; *Re Walker*, (1917) 1 Ch. 98] and says that unless a contrary intention appears by the will, even a deferred gift vests in the legatee, on the testator's death. If a bequest is made to a person for life and after his death to his children, the bequest becomes vested in each child, when it is born and the vesting is not postponed till the death of the life-tenant. Such interests are called **Vested Remainders**. The expression "after the death" is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession vests, *Ernest Williams Adams v. Gray*, 48 M.L.J. 707 : (1925) M.W.N. 123 : A.I.R. 1926 Mad. 599; *Hazara Singh v. Banta Singh*, I.L.R. (1958) Punj. 1652—A.I.R. 1960 Punj. 267. Similar is the effect of the expression "on her death" used in relation to a life-tenant; such an expression simply serves to indicate when the gift over is to be reduced to possession and not the time when the right to such possession becomes vested, *Swarnamoyee Dasi v. Probodh Chandra Sarkar*, 55 C.L.J. 420—36 C.W.N. 768—A.I.R. 1933 Cal. 253—143 I.C. 402. Such expressions do not imply the creation of Substitutional estates, *Ibid.* *Comp. Purna Chandra v. Sudhangshu*, 49 C.W.N. 524. A gift to daughters after the death of the wife, gives the daughters a vested remainder, *Mt. Ghulam Jannat v. Ralmat Din*, 95 P.L.R. 40—A.I.R. 1934 Lah. 427. For other instances of vested remainders, read the notes at p. 207, ante; also *Siddappaji v. Nanjappaji*, 6 Mys. L.J. 301. Cf. *Fool Cooverbai v. Keshri Singh*, 45 M.L.J. 249; A.I.R. 1923 P.C. 112 : 13 I.C. 242. The words, "proper time" mean some time other than the date of the death of the survivor of the testator's estate and may be equivalent to "at proper age or at majority" *Kuppuswami Mudaliar v. Ranganatha Mudaliar*, 46 L.W. 660—A.I.R. 1937 Mad. 835. As to an instance of postponement of possession or enjoyment not hindering the immediate vesting read the P.C. case of *Ganapathy Pillay v. Alamatoo*, (1929) A.O. 492—27 A.L.J. 1075 (P.C.). As to the effect of vesting, vide notes under sec. 104, *supra*, at pp. 207-08, ante;

Effect of vesting. *Word v. Brown*, (1916) A.O. 121; *Re Ussher*, (1922) 2 Ch. 821; Cf. *Bhupendra v. Amarendra*, 20 C.W.N. 169 (P.C.). The effect is that the legacy is not defeated by the death of the legatee before the actual moment when the legacy becomes capable of being reduced to possession, see *Barnes v. Allen*, 1 Bro. C.C. 181. For distinction between the expression, "vested in interest" and "vested in possession" vide notes at p. 207, ante. The law always favours constructions which imply a vested interest; Cf. *Booth v. Booth*, 390, and therefore where immediate vesting is defeated by the imposition of repugnant condition, the Court will allow the vesting and reject the repugnant conditions. Thus, when it vests it vests indefeasibly. Cf. *Weatherall v. Thornburgh*, 8 Ch. D. 261; *Lloyd v. Webb*, 24 Cal., 44; *Gosain v. Rivett*, 13 Bom. 463; *Husenbhoy v. Ahmedbhoy*, 26 Bom. 319; *Holden v. Harden*, (1909) A.O. 210. Also *Gossing v. Etcock*, (1909) 1 Ch. 448; *Williams v. Williams*,

(1907) 1 Ch. 180. So it has been said that in absence of anything to the contrary a bequest vests in the devisee from the date of the testator's death, *Ammal v. Swami Pillai*, 11 M.L.J. 27; vide also *Narayan Iyer v. Anas Iyer*, (1912) M.W.N. 189; 17 I.C. 764. A testator appointed two executors and directed them to pay off his debts and to pay a maintenance allowance to his widow out of the residue remaining after payment of debts, and after the death of the widow to divide the residue between themselves, the executors predeceased the widow, but were held to get a vested interest on the testator's death, *Kolla Subramaniam v. Thellenayakulu*, 4 Mad. 124; *King v. Denison*, 1 Ves. & D. 272.

Divesting or Defeasance of vested interest:—In the foregoing paragraph, vesting has been said to take place indefeasibly; that simply means that vesting cannot be thwarted; it does not mean that an estate once vested cannot get subsequently divested. For such defeasance of vested interest see the following cases: *Simmonds v. Cook*, 28 Beau. 455, also see illustration (vi) and *Andrew v. Andrew*, L.R. 1 Ch. D. 410; *Day v. Radcliffe*, 8 Ch. D. 654; *Re Bathe, Bathe v. Public Trustee*, (1925) 1 Ch. 877; *Ganapathy Pillay v. Alomalco*, (1929) A.C. 462—27 A.L.J. 1075 (P.C.); *Ernest Williams Adams v. Gray*, 48 M.L.J. 707; (1925) M.W.N. 123; A.I.R. 1925 Mad. 599. Read the notes under secs 124 & 181, post. A testator left an adopted son and a widow and provided by his will that the adopted son shall succeed to his estate, and that in the event of the adopted son's death without issue, the widow will have authority to adopt three sons in succession, but until a second adoption is made "the estate shall remain in the ownership and possession of the widow as an ordinary heir, and the estate is to vest in the adopted son immediately on adoption", held the adopted son, on the death of the testator took an estate of inheritance and not a mere life interest, subject to a condition of defeasance, *Manskyamala Bose v. Nanda Kumar Bose*, 89 Cal. 1306: 4 C.L.J. 957; 11 C.W.N. 12. Similarly, where an estate was given to the two sons of the testator, half and half, with a condition that in the event of one of them dying after the testator without a son, the other one would get the moiety interest of the son so dying, the Court construed it as a mere divesting and defeasance provision, *Indira Rani v. Akhoy Kumar*, 59 I.A. 419=56 C.L.J. 423=87 C.W.N. 168=84 M.L.J. 48=1932 M.W.N. 1801=9 O.W.N. 1113=A.I.R. 1932 P.C. 269=140 I.C. 483, P.C. A defeasance clause providing for the lapse of the legacy of a Parsi legatee upon his marrying a non-Parsi or a person not professing Zoroastrian faith is perfectly valid under sec 181, post. *Korshed Maneck v. Official Trustee, Bombay*, I.L.R. (1948) Bom. 509=50 Bom. L.R. 108=A.I.R. 1948 Bom. 819. Similar is the position with respect to two vested remainder holders as between whom the provision was that on the death of one during the life-time of the life-interest holder, the survivor would take his interest, *Manikam Pillai v. Venkateswar Chetti*, A.I.R. 1927 Mad. 494=99 I.C. 705. A clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person; in absence of a definite gift over no divesting of

the earlier gift results, *Chandidas Sinha v. Malinabala*, 41 C.W.N. 439. A clause of defeasance can be operative only in those cases in which sec. 181, can be made applicable. Where there is a gift over as on a contingency, the gift over will take effect as a defeasance provision on the happening of the contingency. Read the notes under the headings, "Gift over on a contingency" under secs. 124 & 181; also *Kanniah Naidu v. Manickam Pillai*, 68 M.L.J. 144 = 1985 M.W.N. 618 = A.I.R. 1985 Mad. 86 = 154 I.C. 488; *Thayalal Achu v. Kannambati*, 68 M.L.J. 707 = 1985 M.W.N. 562 = A.I.R. 1985 Mad. 704 = 156 I.C. 846. But where the gift over is a mere curtailment of an absolute estate already created, it will be void for repugnancy, read the notes under the heading, "Gift over on a contingency" under sec. 124, post; *Rameshwar Baksh v. Balaji Kudur*, 40 C.W.N. 8 = 1935 A.L.J. 1183 = 37 Bom. & R. 862 = A.I.R. 1935 P.C. 187 = 157 I.C. 888 (P.C.); *Bhupati Charan Basu v. Chandi Charan*, 39 C.W.N. 390 = A.I.R. 1935 Cal. 154 = 158 I.C. 241; *Ali Raza Khan v. Nawazish Ali*, 1938 O.W.N. 1157. An absolute gift remains in full force if a defeasance clause, in favour of daughter having issue which means a living issue and not a whilom issue, fails by reason of non-happening of the contemplated event, *Kannamma v. Machamma*, 1927 M.W.N. 909 = A.I.R. 1928 Mad. 297 = 107 I.C. 497. In consequence of the provisions of sec. 181, post, a condition of defeasance attached to a gift *per se* is not necessarily repugnant to the otherwise absolute character of the gift. *Advocate-General v. Vithaldas*, 22 Bom. L.R. 1005 : 68 I.C. 996. As to the difference between a defeasance clause and a repugnant one, read the notes at p. 244 and also *Golak Behari v. Suradhan Dasi*, B.L.R. (1939) 1 Cal. 69 = 68 O.L.J. 246 = A.I.R. 1939 Cal. 226 = 181 I.C. 705.

Contrary Intention:—This section applies only when no contrary intention appears from the will. See *Knight v. Cameron*, 14 Ves. 389. So, if the testator himself has indicated in the will at what exact moment, the legacy is to vest, his intention must be given effect to, *Glanvill v. Glanvill*, 2 Mer. 88. Cf. *Tara Churn v. Suresh*, 16 I.A. 166 : 17 Cal. 122. As to the testator's power to determine the time when the legacy is to become payable, *Venkatadri v. Parthasarathi*, 48 Mad. 312 : 48 M.L.J. 627 : 29 C.W.N. 989 : 87 I.C. 324 (P.C.). By conferring a power of appointment, the testator does not necessarily intend a deferment of the vesting of the remainder, *Kali Prasad Gope v. Ram Prasad Sanyal*, A.I.R. 1937 Pat. 163 = 167 I.C. 831 [Power does not suspend the remainder from vesting].

What words imply vesting:—No particular words need be used to create a vested interest, *Re Jobson*, 44 Ch. D 154. All that is necessary is not to import any word that will imply uncertainty. If there is a definite intention to give operation to a legacy (whether immediately or after a period), there is a vested interest. *Callynath v. Chandernath*, 8 Cal. 978. Such words as "descends," "involves," "goes to," "get," "shall vest" often indicate a vested interest. *Vide Morris v. Brown*, 28 Cal. 621 : 5 C.W.N. 729 (P.C.). For the effect of the expression "shall become vested" see *Mathwosath v. K. Dasya*, 57 I.C. 747 (Cal.). Compare the

expression "vested interest" with "Contingent interest"; and *vide* notes at p. 246. A direction to pay at a certain age (*Strimpton v. Strimpton*, 81 Beav. 425) or after a life estate (*Re Burnell's Trust*, 3 K. & J. 280), implies a vested interest; see illus. (iii) above and *Jairam v. Kuverbai*, 9 Bom. 491; but see *Hanson v. Graham*, 6 Ves. 289; *Cf. Stuart v. Wrey*, 30 Ch. D. 507; *Bachman v. Backman*, 6 All. 689; *Spencer v. Duckworth*, 18 Ch. D. 984; *Collison v. Barber*, 12 Ch. D. 884; *Kolla Subramaniam v. Thellayanakula*, 4 Mad. 124; *Guroodas v. Sarat*, 29 Cal 699 : 6 C.W.N. 721. A testator bequeathed a sum of money after the lifetime of his daughter to such of her children as being sons shall attain 21 or being daughters shall marry or attain 21. Then followed a clause that "if she should die leaving no child living at her death who being a son shall attain 21, so much thereof as shall not have become vested should go to my son." A son of the testator's daughter attained the age of 21 but died in her life-time. Held, such son obtained a vested interest and such interest was not divested by reason of his not surviving her, and hence the gift over to the son did not take effect, *Ernest Williams Adams v. Gray*, 48 M.L.J. 707 : (1925) M.W.N. 128 : A.I.R. 1925 Mad 599. Cf. *Ballin v. Ballin*, 7 Cal. 218; *Lucas Tooth v. Lucas Tooth*, (1921) A.C. 694; *De Souza v. Paz*, 12 Bom., 137. In a devise to wife for life with remainder to son accompanied by a power of appointment in favour of the widow to give away some property to daughter's son in default of male issue, the vesting of the remainder is not suspended by reason of the power, *Kali Prosad Gope v. Ram Gelan Sahu*, 17 Pat. L.T. 876 = A.I.R. 1937 Pat. 163 = 167 I.C. 831.

Contrast between Vested interest and Contingent interest:—In a vested interest the legatee has a definite interest which is *sure* to take effect some day or other. There is an element of *certainty* in it, *Martin v. Martin*, L.R. 2 Eq. 404; *Re Drey*, 30 O.D. 507. Thus, a gift is made to A for life and after A's death to B. Here the gift to B is *sure* to take effect, as A will certainly die some day. Cf. *Monmohan Nath v. Rohilmoni*, 27 All. 406. In such a case even if B dies before the gift can take effect in his favour, his heirs or representatives will step into his shoes to enjoy the gift. B's interest is *vested* and is commonly called *vested remainder*. *Kashhusru v. Shirinbai*, 43 Bom. 88 : 21 Bom. L.R. 180 ; 9 L.W. 426 : 29 O.W.N. 419 : 51 I.C. 481 (P.C.); *Kuar Nageshar v. Kuar Mata*, 69 I.C. 730; *Kalikant v. Rajanikanta*, 69 I.C. 308 (C.); *Lucas Tooth v. Lucas Toth*, (1921) A.C. 694. Cf. *Bilaso v. Munnilar*, 93 All. 558; *Bhagabati Charan v. Kali Charan*, 88 Cal. 468; also 43 Bom., 88. The essence of a *CONTINGENT* interest is that it depends upon the fulfilment of some condition, and stands or falls according as the condition is fulfilled or not, *Taracharan v. Suresh*, 17 Cal. 122 (P.C.). So there is not that element of *certainty* in it which we have in the other. Thus, a testator bequeathed his estate to A for life, but in case he dies under 21, then over to B. Here B's interest is *contingent* as the condition of A's death under 21 may or may not happen. Cf. *Re Wilmott's Trusts*, L.R. 7 Eq. 632. *Re Kirkley*, 67 L.J. Ch. 247; but in a bequest to A and after his death to B, the interest of B is *vested* and not

contingent, in as much as the death of a living person is not an uncertain contingency. *Darshan Singh v. Wali Khan*, 27 A.L.J. 274—A.I.R. 1929 All. 102—116 I.C. 80. When the gift is in reality a gift of a remainder estate and is not made contingent on the donee's surviving the widow, it is a vested remainder and not a contingent remainder, and is attachable under sec. 60 of the C.P. Code. A direction as to what will happen if the owner of the vested remainder fails to reduce it to possession will not have the effect of cutting down a vested interest into a contingent one. *Rajeswari Kuer v. Khukana Kuer*, 48 C.W.N. 78—(1943) 2 M.L.J. 169—I.L.R. (1943) Ker. (P.C.) 117—46 Bom. L.R. 509—A.I.R. 1943 P.C. 121—209 I.C. 408 (P.C.). The condition that the legatee should take only if he is of a particular character, gives him only a contingent interest, which is inalienable. *Surendra Nath v. Kala Chand Banerji*, 12 C.W.N. 668. *Vide*, also 8 C.W.N. 416. The condition of good conduct and behaviour as a condition precedent for vesting has been left undecided in 1965 S.O.J. 68—A.I.R. 1967 S.C. 815. In a bequest to wife for life and after her death to sons or their heirs who may then be in existence with a further direction that the sons would not be entitled to the estate during the lifetime of the wife, there was no immediate vesting of the estate in the sons on the testator's death, with the result that the sons had only a contingent interest during the wife's life-time. *Ganesh Prosad v. Monoharlal*, I.L.R. (1939) 1 Cal. 305—43 C.W.N. 490—A.I.R. 1940 Cal. 202—187 I.C. 801. It should be noticed that a contingent interest can develop into a vested interest when the condition precedent is performed or fulfilled, *Lallu v. Jagmohan*, 92 Bom., 409. The following points of difference between the two interests should be noted. (1). A vested interest is certain, while a contingent interest is not so; (2) The former depends upon no condition but the latter does; (3) The former is transmissible and heritable and is not defeated by the death of the legatee during the deferred period (p. 243 ante), (*Vide Bens Madho v. Bhagwan*, 83 All. 658—following 38 Cal. 468); but the other one is not so. *Vide Ellokasi v. Durponaram*, 5 Cal. 69; (4) In a vested interest there is a present, immediate right even when the enjoyment or possession of the estate is postponed, *Chunslal v. Bai Muli*, 24 Bom., 420. In the other case there is no such right but a mere promise for giving one and such promise may be nullified by the failure of the condition. Cf. *Ernest Williams Adams v. Gray*, cited at p 246; *Cowaji Edalji v. Ratan Bai*, 27 Bom. L.R. 1 : 47 M.L.J. 860 : 1 O.W.N. 869 (P.C.).

Life estate conferred on females:—Does not become a Hindu widow's or Hindu women's estate, which for the time being may rank as an absolute estate, because the widow may alienate the property for legal necessity and disappoint an expectant reversioner. The life estate conferred on a female remains a life-estate pure and simple with a remainder over. The life-estate holder can never disappoint a remainder man under any circumstance. *Kale Prosad Gope v. Ram Golam Sahu*, 17 Pat, L.T. 876—A.I.R. 1937 Pat. 163—167 I.C. 881. A Hindu widow's estate may rank as high as an absolute estate with a power of alienation

conditioned by legal necessity leaving nothing for the reversioner beyond a mere *spes successionis*, but a Hindu woman's life-estate under a will is but a limited interest, leaving the balance of the estate as a substantial property in the remainder man. In this connection read VI Legal Miscellany, 94—commenting on 66 O.W.N. 149.

120. [Suc. S. 107] (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

Date of vesting when legacy contingent upon specified uncertain event
 (2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

Illustrations.

(i) A legacy is bequeathed to D in case A, B and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age.

(ii) A sum of money is bequeathed to A "in case he shall attain the age of 18," or "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

(iii) An estate is bequeathed to A for life, and after his death to B if B shall then be living; but if B shall not be then living to C. A, B and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened.

(iv) An estate is bequeathed as in the case last supposed. B dies in the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.

(v) A legacy is bequeathed to A when she shall attain the age of 18, or shall marry under that age with the consent of B, with a proviso that if she neither

attains 18 nor marries under that age with B's consent, the legacy shall go to C. A and C each take a contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy although she may have married under 18 without the consent of B [See *Austen v. Halsey*, 18 Ves., 126].

(vi) An estate is bequeathed to A until he shall marry and after that event to B. B's interest in the bequest is contingent until the condition is fulfilled by A's marrying.

(vii) An estate is bequeathed to A until he shall take advantage of any law for the relief of insolvent debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of such a law.

(viii) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.

(ix) A leaves his farm of Sultanpur Khurd to B, if B shall convey his own farm of Sultanpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.

(x) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without B's having married C, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible.

(xi) A fund is bequeathed to A if B shall not make any provision for him by will. The legacy is contingent until B's death.

(xii) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(xiii) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

N.B.—This section is applicable to Hindus etc. It corresponds to sec. 21 of the Transfer of Property Act. The principle underlying the section was based on *Edwards v. Edwards*, 15 Beav. 357, which has in part been overruled by *O'Mahoney v. Burdett*, 7 H.L. 388. Read *Ambalal Har Govind v. Ambalal Shivalal*, 34 Bom. L.R. 1606.

Contingent Interest:—This section defines a Contingent interest, and says that a contingent interest does not vest in the legatee until the contingency is fulfilled. We have seen at p. 247, that in the case of a contingent interest, the

legatee gets no proprietary interest in the legacy until the condition precedent is fulfilled, *DeSouza v. Vaz*, 12 Bom., 187. As the estate does not vest in the legatee before the fulfilment of the condition, it necessarily follows that if the legatee dies in the meantime, his heirs get nothing. In this is the chief point of distinction between a *Vested* interest and a *Contingent* interest, *vide* notes and cases at p. 247, ante. When a bequest is made to A and after his death to B, the interest of B will be a vested and not a contingent one, inasmuch as the death of A is not an uncertain event, *Darshan Singh v. Wali Khan*, 27 A.L.J. 274 = A.I.R. 1929 All. 102 = 116 I.C. 80. But a bequest to S with a gift over to R in the event of S dying issue less, gives rise to a contingent interest, because although death is a certain event, death without issue is not, *Kamla Debi v. Darrathlal*, 20 Pat. L.T. 90 = 1939 P.W.N. 349. All estates depending on future contingent events fall within the meaning of this section, *Bhupendra v. Amarendra*, 41 Cal. 642 : 18 C.W.N. 360 ; 24 I.C. 468 (on appeal to P.O., 48 Cal. 492 : 34 I.C. 892 : 20 C.W.N. 169). A legacy to A, to be paid as soon as he attains 21, and in case he attains that age and not otherwise, is contingent, *Knight v. Cameron*, 14 Ves., 389 ; see also *Simmonds v. Cooks*, 29 Beav. 455 ; *Atkinson v. Turner*, 2 Atk. 41. The section contemplates two kinds of contingencies. (1) Affirmative, Sub-sec. (1) : Affirmative Contingency. (2) Negative, Provision for the first kind is mentioned in sub-section (1), which refers to the happening of a specified uncertain event, and the contingent interest ripens into a vested interest as soon as that uncertain event happens. Sub-sec. (2) provides for Sub-sec. (2) : Negative Contingency. a negative contingency, which means that the legacy will take effect in the event of the specified uncertain event not happening at all. The test of fulfilment of this negative contingency is the absolute impossibility of its occurrence. Thus, A bequest of the residuary estate to a posthumous son "when he comes of age" has been held to be a contingent interest within the meaning of the initial clause of this section, *Cowasji Edalji v. Ratan Bai*, 52 I.A. 95 ; 49 Bom. 167 ; 27 Bom. L.R. 1 : 47 M.L.J. 860 : 1 O.W.N. 863 (P.C.) (on appeal from A.I.R. 1928 Bom. 96 : 70 I.C. 178) ; *vide* also *Bhupendra v. Amarendra*, *supra*, and *Gardiner v. Gardiner*, 25 Beav. 509 ; *Re Blackwell : Blackwell v. Blackwell*, (1925) 1 Ch. 312.

Exception :—When the bequest is given to a legatee on his attaining a particular age, it will not be contingent in the two cases provided for in this EXCEPTION clause : viz. (1) if the income from the estate is given absolutely to the legatee in the meantime (that is, before he attains the particular age), or (2) if such income (or so much of it as is necessary)* is applied in the meantime for his benefit, *Vaudry v. Geddes*, 1 Russ. and My. 208.

* The exception applies even where a part of the income is directed to be applied for the benefit of the legatee, *vide Ratan Bai v. Cowasji Edalji*, 24 Bom. L.R. 1124 : A.I.R. 1928 Bom. 96 : 70 I.C. 178.

This EXCEPTION has no application if the income of a fund other than the bequeathed one be so applied for the legatee's benefit, see *illus.* (xiii). Compare the above principle with the cases of *Scotney v. Lower*, 29 Ch. D. 535 and *Batsford v. Kebbell*, 3 Ves., 363. Where a legacy is given to a person at a future time and the testator either gives him the intermediate interest, or directs it to be applied for his benefit, the Court will presume it to mean an immediate gift, and look upon it as a vested interest, *Saunders v. Vautier*, 1 Cr. & Ph. 240; *Hoath v. Hoath*, 2 Bro. C.C. 4; *Re Gosling*, (1903) 1 Ch. 448; *Mathuranath v. Monmohini*, 58 I.C. 747. This EXCEPTION goes beyond the English Law. It is sufficient to bring a case within its scope if the direction is to apply so much of the income, as may be necessary, for maintenance, *Ratanbai v. Cowasji Edalji*, 24 Bom. L.R. 1124 : A.I.R. 1923 Bom. 96 : 70 I.C. 178. The Exception contemplates only one contingency of attainment of a particular age, and has no application to a case of double contingency, *Sopher v. Administrator-General of Bengal*, 71 I.A. 93 = I.L.R. (1945) 1 Cal. 1 = 45 C.W.N. 585 = (1944) 2 M.L.J. 20 = 1944 M.W.N. 467 = 46 Bom. L.R. 865 = 1944 A.L.J. 404 = A.I.R. 1944 P.C. 67 = 216 I.C. 68 (P.C.).

Words which generally indicate Contingent Interest:—The following words generally indicate a conditional bequest or a bequest subject to a contingency:—"at a certain age"; "in case"; "in the event of"; "provided"; "if"; "when"; "on or upon"; "subject to"; "should"; but there is no invariable rule that all these expressions must necessarily imply a conditional gift. The context of the will and its general sense will be the best determinant of the vested or contingent character of a bequest. *Vide* the following cases, *Leake v. Robinson*, 2 Mer. 363; *Hanson v. Graham*, 6 Ves., 299; *Walker v. Mower*, 16 Beav. 365; *Re Goodwin, Ainslie v. Goodwin*, (1924) 2 Ch. 26.

Presumption against Contingent Character:—There is a presumption in favour of immediate vesting, and therefore necessarily against the contingent character of the bequest, see *Saunders v. Vautier*, 1 Cr. & Ph. 240; *Hoath v. Hoath*, 2 Bro. C.C. 4 (*supra*).

Gift to a class:—The principle embodied in the exception (at p. 250) also applies when the gift is to a class, *viz.* *Loyd v. Loyd*, 2 K. & J. 90; *Re Mervin*, (1891) 3 Ch. 197; *Re Parker*, 16 Ch. D. 44; also *vide* the next section.

121. [Suc. S. 108] Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Vesting of interest in
bequest to such mem-
bers of a class as shall
have attained particular
age.

Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.

N. B.—This section applies to Hindus etc. It corresponds to sec. 22 of the Transfer of Property Act.

Gift to Contingent Class:—This section lays down what may be called the rule relating to gift to contingent class. We have seen under sec. 111, *supra*, that there is a definite period within which a gift a class *must* vest, but the legacy may be so worded that only such members of the class will take as attain a particular age. So it necessarily follows that those members who do not attain the specified age within the *definite* period within which the estate is to vest, will forego the legacy. *Ballin v. Ballin*, 7 Cal. 218. Therefore, only a fluctuating number of members will take the legacy and the determination of such number will depend upon how the contingency is fulfilled. Therefore, the class is called a contingent class. For vesting of interest in such members of a contingent class as fulfil the contingency, *vide Masseyk v. Fergusson*, 4 Cal. 304; *Ballin v. Ballin*; *supra*; *De Souza v. Vaz*, 12 Bom. 137; *Leake v. Robinson*, 2 Mer 363; *Bull v. Pritchard*, 1 Rus., 213; *Thomas v. Wilberforce*, 81 Beav. 289. Those members who die before attaining the particular age (*i.e.* before fulfilling the contingency) do not get any vested interest, with the result that they transmit nothing to their heirs. The reason of the rule for exclusion of persons below the specified age is that before the attainment of that age there is no person completely answering the description of the legatee given by the testator.

CHAPTER IX

OF ONEROUS BEQUESTS

122. [Suc. S. 109] Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A, having shares in (X), a prosperous joint stock company, and also shares in (Y), a joint stock company in difficulties in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock

companies : B refuses to accept the shares in (Y). He forfeits the shares in (X).

N. B.—This section applies to Hindus etc. It corresponds to the first part of sec. 127 of the Transfer of Property Act (IV of 1882). *Vide* the illustrations to that section.

Onerous Bequests:—A bequest may not always be of a purely beneficial character, but may at times be burdened with an obligation, e.g. when shares in a joint-stock company subject to heavy calls form the subject matter of the bequest. *Vide* the illustration. It is then called an onerous gift. If the legatee means to accept the bequest he must take it with the obligation or not at all. There is however a proviso to this rule. If, instead of there being a single bequest, there be two separate and independent bequests, of which one is beneficial and the other is onerous, the legatee is at liberty to accept the beneficial one and refuse the other. This proviso is embodied in sec. 123 below.

Application of the Section:—The section applies only in the case of a single bequest. But if the bequest be apparently single and there be indication in the will that the testator intended to keep the benefit distinct from the obligation, giving the legatee a choice, this rule will not apply, *Guthrie v. Walrond*, 22 Ch. D. 673. The gifts may be in substance distinct though given by the same sentence in the will, *Re Baron Kensington*, (1902) 1 Ch. 203; *Honywood v. Honywood*, (1902) 1 Ch. 347.

Estoppey arises from acceptance:—If a legatee accepts a gift burdened with a condition he cannot decline to fulfil it, *Gregg v. Coates*, 23 Beav. 39; *Attorney-General v. Christ's Hospital*, Taml. 393.

123. [Suc. S. 110] Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He will not by this refusal forfeit the money.

N. B.—This section applies to Hindus etc. It corresponds to the latter part of sec. 127 of the Transfer of Property Act. *Vide* the illustrations to that section.

Separate and Independent Bequest:--This section is virtually a proviso to sec. 122 (*Vide* notes under that section), and lays down the conditions under which the rule of that section will not apply. *Vide Green v. Brittain*, 82 L.J. Ch. 187; *Guthrie v. Walrond, supra*; *Sye v. Gladstone*, 30 C.D. 614; *Aston v. Wood*, 22 W.R. (Eng.) 893. This section will not apply unless the bequests are *separate* and *independent*. Bequests will not be *separate* and *independent* within the meaning of this section if the testator manifests an intention in the will that they are to be taken together or not at all, *Vide Green v. Brittain, supra*; *Guthrie v. Walrond, supra*.

CHAPTER X

OF CONTINGENT BEQUESTS.

124. [Suc. S. 111] Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence.

Illustrations.

(i) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect. [See *Cambridge v. Rous*, 8 Ves., 12; *Edwards v. Edwards*, 15 Beav. 357].

(ii) A legacy is bequeathed to A, and, in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect. [See *Cambridge v. Rous*, 8 Ves., 12; *Hinckley v. Simmons*, 4 Ves. 160].

(iii) A legacy is bequeathed to A when and if he attains the age of 18, and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect. [See *Home v. Pillars*, 2 My. & K. 15].

(iv) A legacy is bequeathed to A for life, and, after his death, to B, and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B dies without children during the lifetime of A. [See *Edwards v. Edwards, supra*].

(v) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death," to C. The words "in case of B's death" are to be considered

as meaning "in case B dies in the lifetime of A." [See *Edwards v. Edwards*, *supra*; *Bolitho v. Hillyar*, 34 Beav. 150].

N.B.—This section applies to Hindus etc. The rule enunciated in it is a rule of law and not one of construction. *Kamla Prasad v. Murli Manohar*, A.I.R. 1926 Pat. 856=94 I.C. 760; but the Calcutta Court has held it to be both a rule of construction and a rule of law applicable to legacies contingent on the happening of a specified uncertain event, *Purna Chandra Dutt v. Sudhangshu S. Ghose*, I.L.R. (1946) 1 Cal. 1=49 C.W.N. 524. The principle underlying this section was based on *Edwards v. Edwards*, 15 Beav. 357, which has been in part overruled by *O'Mahoney v. Burdett*, 7 H.L. 388. So, the rule cannot be applied as a rule of Justice, equity and good conscience to a will not governed by the Act, *Ambalal Hargovind v. Ambalal Shivilal*, 34 Bom. L.R. 1608=A.I.R. 1933 Bom. 84=141 I.C. 327.

When Contingent Bequests can take effect:—We have seen under sec 120 that the first pre-requisite of the operation or validity of a contingent bequest is that the contingency on which it depends must be fulfilled. This section provides for the next essential requisite. It says that when the will is silent as to the time of occurrence or fulfilment of the contingency, it must occur or be fulfilled before the bequest becomes payable or distributable. This principle accords with the English rule of real property which lays down that "every contingent remainder must vest during the continuance of the particular estate which supports it or co-incident with that particular estate determines." So it has been said that the period of distribution to which an executory devise refers is the period of the death of the first taker, *Chunilal Parvatishankar v. Bai Samrath*, 19 C.L.J. 563: 18 C.W.N. 844 (P.C.). Thus, the word "period" in the section cannot mean an indefinite period after the testator's death, keeping the opening of the succession in abeyance in expectation of the uncertain event, *Bahist Narain v. Sri Ramchandra*, 12 Pat. 18=A.I.R. 1933 Pat. 126=144 I.C. 178. The rule about the validity of contingent bequests herein laid down is a very hard and fast one and "must be applied whenever it is applicable without speculating on the intention on the testator" *Manohar Mukherji v. Kasiswar Mukherji*, 3 C.W.N. 478 (482); Cf. *Narendra Nath v. Kamalbasini*, 28 I.A. 18: 23 Cal. 663, P.C. The applicability of the section depends on a natural meaning as opposed to a forced interpretation of the words used in a will. Cf. *Gunamoni v. Deviprosanna*, 23 C.W.N. 1088: 54 I.C. 897. It should be noticed that the section contains no such qualification "unless a contrary intention appears by the will," which is so persistently present in most of the foregoing sections. Cf. *Ibid*. Therefore, it has been said that the rule in this section is an absolute rule of construction and such rule is not liable to contradiction by other evidence appearing on the face of the will, *Nistarini Debya v. Behary Lal*, 19 C.W.N. 52: 27 I.C. 289. As to what should be done when two constructions are equally possible in relation to

the terms of a will, see *Purna Chandra Dutt v. Sudhangshu S. Ghose*, I.L.R. (1946) 1 Cal. 1 = 49 C.W.N. 524 = A.I.R. 1946 Cal. 55 = 224 I.C. 299. When there is a gift over upon a certain contingency, it will not take effect unless the exact contingency happens, *Wing v. Angram*, 8 H.L. 188; *Elliott v. Smith*, 22 Ch. D. 286. Cf. *Williams v. Chelty*, 3 Ves. 544; thus, A left a will providing "If my wife die before, my daughter shall get the said property," and died leaving him surviving both the widow and the daughter; held, that the legacy to the daughter could not take effect, as the wife did not die in the life time of the testator, *Jagat Bijoy v. Tomijuddi*, 44 Cal., 181; 89 I.C. 228. Again, a testator devised his estate "half and half alike" to his two sons P and J; and provided that if P should have a son, his half of the estate was to be made over to such son on his attaining full age. P survived the testator and had no son; so on the testator's death (i.e. at the time of distribution) P became absolute owner of his half share, the contingency remaining unfulfilled at that time, *Jehangir v. Kaikhurru*, 42 I.A. 71 : 99 Bom. 296 : 21 O.L.J. 210 : 19 C.W.N. 426 : 28 M.L.J. 167 : 13 A.L.J. 217 : 17 Bom. L.R. 197 : (1915) M.W.N. 633 : 27 I.C. 53 (P.C.). Where the testator conveyed the residue of his estate to his son and in the event of the latter's death, without issue to certain deities, the gift to the deities could not take effect unless the son died issueless during the testator's life time and if the son survived the testator, he would take an absolute estate inasmuch as the opening of the succession could not be kept in abeyance in expectation of the son dying issue less at a remote time, *Bishist Narain v. Sri Ram Chandra*, 12 Pat 18 = A.I.R. 1933 Pat 126 = 144 I.C. 179. Where a will provided that "my daughter, on attaining majority, shall get the property and if she be not there, another person would get it" and the daughter died after attaining majority, the other person was held not to get it, *Purna Chandra Dutt v. Sudhangshu S. Ghose*, I.L.R. (1946) 1 Cal. 1 = 49 C.W.N. 524, *supra*.

Scope of the Section:—The section applies only to contingent bequests and not where the legatee takes an absolute interest. *Vide Gobinda Chander v. Benode Chunder*, 12 C.W.N. 44 (46); *Ramlal v. Secretary of State*, 8 I.A. 46. 7 Cal. 304. Where the intention of the testator is to give an absolute estate,

such interest is not cut down by any subsequent terms and is The section does not apply unless the gift is not rendered contingent, *Tripurary v. Jagat Tarini*, 40 I.A. 86 ; 40 Cal. 274 : 17 C.W.N. 145 (P.C.). Cf. *Sardar Newaji v. Puttibai*, 37 Bom. 644 : 15 Bom. L.R. 352; *Vide notes*

under the heading "gift over on a contingency", *infra*, and therefore in such a case this section will have no application. Cf. also *Nistarini Delya v. Behary Lal*, 19 C.W.N. 52, where it has been held that when a testator gives an absolute gift to a legatee and then makes a gift over *Simpliciter* on a contingency of death, he is to be taken as referring to death before the period of distribution. Cf. *Tara Churn v. Suresh*, 16 I.A. 166 : 17 Cal. 122; *Lallu v. Jagmohan*, 22 Bom. 409 (413); *Chandra Kishore Roy v. Prosanna Kumari*, 38 I.A. 7 : 38 Cal. 827 : 18 O.L.J.

58 ; 15 C.W.N. 121 (P.C.) ; *Gurusami v. Siva Kumi*, 22 I.A. 119 : 18 Mad. 347 ; *Damodardas v. Dayabhai*, 21 Bom. 1 (on appeal to P.C. 25 I.A. 126 : 22 Bom. 833 ; 2 C.W.N. 417). Thus, where a testator devised an absolute estate to a female with a proviso that in the event of the death of the female, his nephew was to be the heir but the female survived the testator, the gift over to the nephew was held to be inoperative and the female was held entitled to take an absolute estate, because of the contingency of death did not take place before the period of distribution, namely, the death of the testator. *Kamla Prasad v. Murli Monohar*, 13 Pat. 550 = A.I.R. 1934 Pat. 398 = 152 I.C. 446. Cf. A.I.R. 1926 Pat. 356 = 94 I.C. 760. Unless the devise is executory, this section has no application, see *Gunamoni v. Debi Prosanna*, 29 C.W.N. 1098 : 54 I.C. 897 ; *Harendra v. Basanta*, 22 C.W.N. 689. The provisions of this section apply to all classes of property. *Vide* notes under the heading "Legacy", *infra*. The section applies only when the prior bequest is capable of taking effect and is not *ab initio* void. If the bequest fails *ab initio*, the principle of sec. 129 will apply. *Radha Prosad Mullick v. Ranimoni Dasses*, 93 Cal. 957 (964) : 10 C.W.N. 696 : 8 C.L.J. 502 (S. B.) ; *Vide* also *Chandra Kishore v. Prasanna Kumari*, 88 Cal., 327, *supra*. This section applies only when no time is mentioned for the occurrence of the event on which the bequest depends. [Cf. *Indira Rani v. Akhoy Kumar* 59 I.A. 419 = 56 C.L.J. 423 = 37 C.W.N. 153 = 64 M.L.J. 48 = 1932 M.W.N. 1801 = 9 C.W.N. 1113 = A.I.R. 1932 P.C. 269 = 140 I.C. 483, P.C.]—On appeal from *Akhoy Kumar Ghose v. Indira Rani Ghose*, 56 C.L.J. 417 = A.I.R. 1931 Cal. 499 = 135 I.C. 868. Thus, where a testator provided that on the death of the adopted son and until another adoption "all his properties shall remain in the ownership and possession of his widow as ordinary heir"; after the death of the adopted son, the estate passed to the childless widow of the adopted son; and upon the death of the son's widow, the testator's widow claimed that the executory gift in her favour took effect, but the Court disallowed her contention, holding that the legacy was given to her only if an uncertain event happened, namely the death of the adopted son dying issueless,* and no time being mentioned in the will for the occurrence of that event, that event should have occurred when the bequeathed fund became payable or distributable, see *Manikyamala Bose v. Nanda Koomar Bose*, 83 Cal. 1806 : 11 C.W.N. 12 : 4 C.L.J. 357 (360). *Vide* also *Jehangir v. Kai Khushru*, 39 Bom. 296 : 21 C.L.J. 210 : 19 C.W.N. 426 (P.C.) : 17 Bom. L.R. 197 ; *Vide* also *Edwards v. Edwards*, 15 Besv. 357. If the time of occurrence of the contingency is mentioned in the will at all, it must be fixed definitely and not merely approximately. *Monchar Mukherji v. Kasiswar Mukherji*, 8 C.W.N. 478 ; *Sardar Nowroji v. Putlibai*, 37 Bom. 644 : 15 Bom. L.R. 352. Cf. *Ellokasti v. Durponarain*, 5 Cal., 59 ; *Soorjee*

No time is mentioned
for the occurrence of
the event.

* When death (by itself a certain event) is spoken of as a contingency, it will be construed to mean on death before the period of distribution, and the gift in such cases will be merely substitutional. See *Underhill and Strahan*, 2nd. Ed. p. 308 ; *Hawkins*, 254.

money v. Dinobundhoo Mullick, 6 M.I.A. 526; (9 M.I.A. 128); *Ram Lal Mookerji v. Secretary of State*, 8 I.A. 46; 7 Cal. 304. Likewise, where the words of the will were "My sons shall be entitled to enjoy all the properties equally. Any one of the sons dying sonless, the surviving sons shall be entitled to all the properties equally," it was held that the legacy to the survivors was contingent on the happening of a specified uncertain event which had not happened before the period when the property bequeathed was distributable, that period of distribution being the time of the testator's death; see *Narendranath Sircar's case, supra*; also *Lala Ramjiwan v. Dil Koer*, 24 Cal. 406; for other cases, see *Gurusami v. Siria Kumi, supra*; *Bai Dhan Lazmi v. Hariprosad*, 45 Bom., 1098: 62 I.O. 87; *Maung Po v. Nippean*, 5 Bur. L. T. 187: 16 I.C. 335; *Durga Prasad v. Baghunandanlal*, 19 C.W.N. 499: 23 I.C. 597 (in this case it has been held that a gift over in the event of a minor legatee not attaining full age is valid); *Kannamma v. Machamma*, 1927 M.W.N. 909 = A.I.R. 1928 Mad. 297 = 107 I.C. 497.

Applicability of the Section:—This section applies only to cases strictly coming within its scope. It cannot apply to the case where the testator *mentions* in his will the event on the occurrence of which the distribution is to take place, *Bhupendra Krishna v. Anurendra*, 43 Cal. 482: 20 C.W.N. 169: 23 C.W.N. 169 (176); &c. (*vide supra*). That is, it will not apply if a period is specified in the will within which the contingent event is to happen. In other words, the section only applies if on a reasonable interpretation of the language used by the testator the occurrence of the uncertain event prior to "the period when the fund bequeathed is payable or distributable" is alone within his contemplation. If the terms of the will make that construction of his impossible, the section then does not apply. *Indira Rani v. Akhoy Kumar*, 59 I.A. 419 = 37 C.W.N. 169 = 66 C.L.J. 428 = 64 M.L.J. 48 = 1932 M.W.N. 1801 = 9 O.W.N. 1113 = A.I.R. 1932 P.C. 269 = 140 I.C. 438 (P.C.)—on appeal from *Akhoy Kumar Ghose v. Indira Rani Ghose*, 56 C.L.J. 417 = A.I.R. 1931 Cal. 499 = 195 I.C. 868. Even as regards Hindus its application is confined to special tracts, such as the territories subject to the Lieutenant-Governor of Bengal and the Presidency towns of Bombay and Madras, *Ibid.* For its application in the Punjab, see A.I.R. 1928 Lah 649, cited below. As to what class of cases this section will apply to, *vide notes under the headings "When contingent bequests can take effect" and "Scope of the Section," supra*. Cf. also *Sridevi Amma v. Venkita Parasurama*, I.L.R. (1959) Ker. 666 = A.I.R. 1960 Ker. 1 (F. B.). The applicability of the section depends on a natural meaning as opposed to a forced interpretation of the words used in a will, *Gunamoni v. Deviprosanna*, 23 C.W.N. 1088: 64 I.O. 897. Cf. *Jagat Bijoy v. Tomijuddi*, 44 Cal. 181 (*supra*).

No time is mentioned:—This section applies only when no time is mentioned in the will for the occurrence of the contingency, see at p. 257 *supra*. So when the testator mentions in the will the event on the occurrence of which the distribution

is to take place, this section cannot apply. *Bhupendra Krishna's case, supra*, and the other cases cited under the heading "Scope of the Section" *supra*; *Indira Rani v. Akhoya Kumar, supra*.

Payable or distributable:—That is the point of time before which or *co-instans* the contingency is to happen, *vide* under the headings, "Scope of the Section" and "When contingent bequests can take effect." *Vide* also *Lala Ram Jiwan v. Dal Koer*, 24 Cal., 400. The period of distribution cannot be postponed or extended by the personal incapacity of any beneficiary, *Narendra v. Kamalbasini, supra*. *Vide* also illustrations (ii) and (iv), which show that the contingency (*i.e.* death without children) must take place during the testator's life time or before the determination of the prior life-estate (as the case may be). These two illustrations

are based on what is known as the fourth rule in *Edwards v. Edwards*, 15 Beav. 316 (cited at p. 176 of 23 C.L.J. 189). The Indian Law differs from the English Rule.

When the Indian Succession Act was passed the rule of *Edwards v. Edwards*, was in force in England; but that case has been subsequently modified by later English decisions* according to which the contingency (*i.e.* death without children) may take place *at any time* whether during the continuance of the life tenant or afterwards, but under the Indian law, it cannot take place afterwards.

Annuity:—Bequests which take effect as a corrody are not within the mischief of this section or the rule against remoteness. So an annuity payable out of the estate to the daughter and after her death to her son (or heirs) is operative in law even though the son might be born after the death of the testator. *Jatindra Mohan v. Ghanashyam*, 96 C.L.J. 428; *Gunamoni v. Devi Prosanna*, 29 O.W.N. 1038; 54 I.O. 897. For the case of an annuity subject to condition, *Re Goodwin : Ainslie v. Goodwin*, (1924) 2 Ch. 26.

Gift over on a Contingency:—As to the general effect of gift over, *vide* the cases cited at p. 185, *supra*; also *Bachman v. Bachman*, 6 All., 683; *Suresh Chandra v. Lalit Mohan*, 22 C.L.J. 316: 20 O.W.N. 463: 31 I.C. 405; *Bhupendra Kumar v. Amarendra*, 41 Cal. 642: 18 C.W.N. 860; *Shyam Charan v. Sarup Chandra*, 17 C.W.N. 39: 14 I.C. 708; *Govind Pillay v. Minakshi*, (1911) 2 M.W.N. 669: 22 M.L.J. 204: 19 I.C. 152; *Richard Ross v. Naunilal*, 35 All. 211: 17 C.W.N. 853; 17 C.L.J. 555 (P.C.); *Rea v. Black*, (1943) 1 Ch. 296. But where there is a gift over on a contingency the matter assumes an important aspect under this section, and all the requisites of the section will apply to the case. So, an absolute gift to a legatee with a gift over on a contingency of death, which is a certain condition, must refer to death before the period of distribution. *Nistarini Debya v. Behary Lal*, 19 O.W.N. 52: 27 I.C. 289; *Turner v. Moore*, 6 Ves., 556.

* *O'Mohoney v. Burdett*, L.R. 7 H.L. 988; *Ingram v. Sculter*, L.R. 7 H.L. 408.

See also illustrations (i) and (v). In a recent Calcutta case the will provided "My daughter on attaining majority shall get it and if she be not there, the eldest son of my executor shall get it," and the Court construed it as a contingency of death during minority. This contingency did not happen as the daughter died after attaining majority, the gift over was held to fail, *Purna Chandra v. Sudhangshu*, 49 C.W.N. 524. Read *Jarman on Wills*, 7th Ed. pp. 2079-80. Where there is a gift over upon a certain contingency it will not take effect unless the exact contingency happens, *Wing v. Angrave*, 8 H.L. 183; *Elliott v. Smith*, 22 Ch D. 286; *Williams v. Chetly*, 3 Ves., 544; *Wagstaff v. Crosby*, 2 Coll., 746. When a bequest is made to wife and after her life to nephew if he remained obedient to wife and attends to her and renders her service, it is a contingent bequest to the nephew on the contingency of his doing something. Such a condition is not void for vagueness, *Nathalal Ichhushankar v. Bai Manek*, 46 Bom. L.R. 356-A.I.R. 1944 Bom. 196. Also vide notes under secs. 131 and 132, *post*, which deal with defeasance clauses, that is, conditions providing that on the happening of a particular contingency, an earlier bequest will terminate and go over to another person. Thus, where a will provided that on the death of the testator his two sons were to divide his estate half and half as between themselves and that if subsequently any of the sons died sonless, the surviving son was to get the share of the son dying sonless, the Court held this to be provision for defeating or divesting an earlier legatee on the happening of a contingency, viz., that of a person dying sonless, see *Akhoy Kumar Ghose v. Indira Rani Ghose*, 66 C.L.J. 417-A.I.R. 1931 Cal. 499-1951 C. 868-on appeal to P.C. *Indira Rani v. Akhoy Kumar*, 59 I.A. 419-56 C.L.J. 428-37 C.W.N. 159-64 M.L.J. 48-1932 M.W.N. 1301-9 O.W.N. 1119-A.I.R. 1932 P.C. 269-140 I.C. 488, P.C. It should be noticed that sec. 131; contemplates the happening of "a specified uncertain event". Therefore, there is no defeasance by the happening of a *certain* event, e.g. death. Therefore, where an absolute interest is given and a provision of gift over is made in the event of death of the absolute holder (on the happening of a *certain* event), sec. 131 will not operate and the gift over

No gift over after the will not take effect, see *Ananika Sayana v. Kondappa Naidu*, death of the legatee of absolute interest. (1940) 1 M.L.J. 212-1940 M.W.N. 269-A.I.R. 1940 Mad.

479-191 I.C. 17, or, in other words, once an absolute estate is given to a legatee, the gift over to take effect after the death of the legatee is void and ineffective, *Parshotam Das v. Shivram*, A.I.R. 1940 Lab. 287-189 I.C. 546. Read the notes at p. 244, *ante*, under the heading, "Divesting or defeasance of vested interest," also *Rameshwari Baksh v. Balraj Kuar*, 40 C.W.N. 8-37 Bom. L.R. 849-1935 A.L.J. 1133-1935 M.W.N. 1122-37 P.L.R. 666-A.I.R. 1935 P.C. 187-157 I.C. 888 (P.C.); *Bhupati Charan v. Chandi Charan*, 89 C.W.N. 890-A.I.R. 1935 Cal. 154-156 I.C. 241.

Legacy:—In the application of the section no distinction is made between moveable and immoveable property, *Narendra v. Kamalbashini*, 23 I.A. 18: 23 Cal. 563 (P.C.).

Mode of construing the Section:—The language of this codified law must receive its natural meaning without any assumption as to the intention of the Legislature to have altered the law as it existed before, *Narendra Nath v. Kamalbasini*, 28 I.A. 18 : 28 Cal. 563, P.C. The rule of this section being a statutory rule of construction the Court is bound to follow it, *Nistarini Debya v. Beharilal*, 19 C.W.N. 52 : 27 I.C. 289. It should be applied only to cases strictly coming within its scope ; and it does not apply to the case where the testator mentions in his will the event on the occurrence of which the distribution is to take place, *Bhupendra Krishna v. Amarendranath*, 43 I.A. 12 : 43 Cal. 482 : 23 C.W.N. 169 ; 30 M.L.J. 110 : 19 M.L.T. 97 : 14 A.L.J. 167 : 3 L.W. 252 : (1916) 1 M.W.N. 73 : 18 Bom. L.R. 847 . 84 I.C. 892 (P.C.) ; but see *Advocate-General v. Vithaldas*, 22 Bom. L.R. 1005 : 68 I.C. 996 ; *Gulbajji v. Rustomji*, 49 Bom. 478 = 27 Bom. L.R. 380 : A.I.R. 1926 Bom. , 282.

Application of the Section in the Punjab:—As the sections mentioned in Sch. III are applicable to Hindus etc. only in the Lower Provinces of Bengal subject to its Lieutenant-Governor and in the towns of Madras and Bombay (*vide* sec. 67, *supra*), this section cannot apply to the Hindus etc. in the Punjab, *Prem Singh v. Hardit Singh*, A.I.R. 1923 Lah. 649 ; *vide* under "Applicability of the Section."

125. [Suc. S. 112] Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as are alive at the time of payment or distribution, unless a contrary intention appears by the will.
Bequest to such of certain persons as shall be surviving at some period not specified.

Illustrations.

(i) Property is bequeathed to A and B to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B. [See *Cripps v. Wolcott*, 4 Madd. 16].

(ii) Property is bequeathed to A for life, and, after his death, to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A ; C survives A. At A's death the legacy goes to C. [See *Hearn v. Baker*, 2 K. & J. 388].

(iii) Property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that, if B should not survive the testator, his children are to stand in his place. C dies during the life of the testator ; B

survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B. [See *Rogers v. Towsley*, 9 Jur. 575].

(iv) Property is bequeathed to A for life, and, after his death, to B and C, with a direction that, in case either of them dies in the life-time of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C. [See *White v. Baker*, 2 De G.F. & J. 55; *Sourfield v. Howes*, 3 Bro. C.C. 90].

N.B. — This section applies to Hindus etc. It corresponds to sec. 24 of the Transfer of Property Act.

The Principle of the Section: — It lays down that where property is given to the survivors or survivor of a group of certain persons, the period of survivorship refers to the time when the payment or distribution of the legacy is to be made, *Cripps v. Wolcott*, (4 Madd. 15, *supra*). In the case of immediate gifts, the period of distribution is the testator's death, *vide illus.* (1); also *Stevenson v. Gullan*, 18 Beav. 590. In the case of deferred gifts, the period of distribution is the moment when the prior bequests determine, *vide illus.* (ii); also *Cripps's case*, *supra*; *Drakeford v. Drakeford*, 33 Beav., 43; *Re Fore*, 35 Beav., 163; *Naylor v. Robson*, 34 Beav., 571. This section will apply only where the legatees are certain persons and not members of a fluctuating class. The expression "such as shall be alive" means the persons surviving, or shortly, the "survivors", at the time when the legacy becomes payable or distributable. Cf. *White v. Baker*, 2 DeG. & F.J. 55; also *Powell v. Hellicar*, (1919) 1 Ch. 198; *Cole v. Allcot*, (1906) 1 Ch. 47. As to division or distribution of the estate, see *Collison v Barber*, 12 Ch. D. 834; *Chaston v. Seago*, 18 Ch. 218; *Gaskell v. Harman*, 11 Ves., 497. The strictness of this rule may be softened or avoided by manifest provision to the contrary in the will, *vide infra* under "Unless contrary intention etc." The effect of this section is not to permit misconstruction in order to help the doctrine of Acceleration, *Re Taylor*, 3 All. E.R. 66.

Presumption as to Survivorship: — There is no presumption as to the time of death except that under secs. 107 & 108 of the Indian Evidence Act. So in cases where the aforesaid provisions of the Evidence Act cannot be exploited, the factum of death must be proved affirmatively; Cf. *Fanibhusan v. Surjakanta*, 85 Cal. 25 : 11 C.W.N. 833; *Narko v. Phakia*, 97 Cal., 103 : 11 C.L.J. 138; 14 C.W.N. 341 : 5 I.C. 709; *Basharat v. Najir Khan*, 88 P.R. 1918 : 128 P.L.R. 1918; Cf. *Re Law's Trusts*, 6 Ch. 336; Cf. 10 W.R. 284.

Unless contrary intention appears, etc.: — The principle of this section applies only when there is no contrary intention appearing from the will. *Vide* illustrations (iii) and (iv) which show how the application of the section is excluded by man-

festing a contrary intention. In either of them, survivorship is ascertained not with reference to the time when the legacy is distributable, but with reference to some other time appointed by the testator. This saving clause has considerably mitigated the rigour of the rule of this section.

CHAPTER XI

OF CONDITIONAL BEQUESTS.

Summary of the Law :—The following observation of the Law Commissioners has practically summed up the whole law on the subject and the reason therefor : "On the subject of CONDITIONS we have deemed it right to abstain from introducing into India the very refined distinctions which the Court of Chancery has, in questions relating to personal property, borrowed from the Ecclesiastical Courts. We think that the words of the Will should be adhered to where no condition inconsistent with law or morality is sought to be imposed ; that all bequests made upon illegal, immoral, or impossible conditions should be void ; and that wherever the testator's wishes can be carried into effect, if expressed in one way, they ought to be permitted to take effect, if expressed in any other way ; so that whatever he can do by a limitation, he ought to be allowed to do by imposing a condition. It appears also to us that whenever a condition subsequent is valid, if accompanied with a gift over, it ought to be valid without a gift over, and ought not to be treated as if it had been inserted merely to frighten the legatee by an unmeaning threat."

**126. [Suc. S. 113] A bequest upon an impossible condition
Bequest upon impossible condition.**

Illustrations.

(i) An estate is bequeathed to A on condition that he shall walk 100 miles in an hour. The bequest is void.

(ii) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

N. B --This section is applicable to Hindus etc. It corresponds to sec. 26 of the Transfer of Property Act (iv of 1882).

Conditional Bequests :—A bequest which depends for its existence on the happening or not happening of some uncertain event is a *Conditional bequest*.

Condition Precedent and Condition Subsequent. When the bequest comes into existence or takes place by reason of the fulfilment of some contingency, the condition is said to be a CONDITION PRECEDENT, but when the bequest is defeated or where the interest already created is to cease to exist or is to pass on to another on the happening of a contingent event, it is called a CONDITION SUBSEQUENT. So there are two kinds of conditions and conditional bequests. In one case the condition comes before the creation of the bequest, and in the other, the bequest is created beforehand, but the condition comes afterwards to defeat it. In the former the condition precedes, and in the other, it follows, the bequest. In the case of the condition precedent, the estate is not in the devisee until the condition is fulfilled (Cf. *Rajendra v. Rakhal, infra*), but in the case of the condition subsequent, the estate is in the devisee but he is liable to be divested of it by reason of non-fulfilment of the condition, *Wynne v. Wynne*, 2 M & G. 8 (14). For instance, a bequest is made to A on condition she marries B; this will be a condition precedent as the condition has to be fulfilled before the bequest can take effect. Again, a legacy is given to A, but if he digs any excavation so as to diminish the value of the property or to affect the buildings adjoining the property he will forfeit the bequest; this is a condition subsequent because the legacy takes effect before A can be divested of his interest because of the breach of the condition. For other instances of a condition subsequent, vide the several illustrations appended to sec. 184, post.

Words necessary to create a condition:—No formal expression is necessary to create a condition whether precedent or subsequent, *Acherley v. Vernon*, Willes., 163 (156). Any expression showing the testator's intention to create a conditional bequest will do, *Re Williams*, 24 T.L.R. 716; *Messenger v. Andrews*, 4 Russ. 478. It is necessary that it should be something more than what is called in English law a condition *in terrorem*, that is, a threat to induce compliance with the condition, *Gonaldas v. Hemandas*, I.L.R. (1942) Kar. 392 = A.I.R. 1942 Sind. 145 = 208 I.O. 230. Read the notes under sec. 184, post. The testator has only got to evince that he means business and desires the non-fulfilment of the condition to take effect as a forfeiture, accelerating a gift over, or a lapse into residuary estate, *Gopaldas v. Hemandas, supra*. Where words used are ambiguous and do not clearly indicate whether a condition precedent or a condition subsequent is intended, the Court will lean towards the latter, *Re Greenwood*, (1908) 1 Ch. 749; *Dayamoyee Darsya v. Jatindra Ch. Das*, 63 C.L.J. 204 = A.I.R. 1957 Cal. 28 = 168 I.C. 410; this is so, because the law always prefers to proceed on the theory of early vesting and contents itself with the supposition that the condition is one of divestment, that is a condition subsequent. Therefore, if it is intended to condition the vesting of the estate, it should be clearly expressed, *Gabrial Togonu v. Evan Adeleye*, 1936 M.W.N. 496 = A.I.R. 1936 P.C. 128 = 162 I.C. 410 (P.C.); *Elizabeth Arminella B. Sifion v. Clifford Sifion*, A.I.R. 1938 P.C. 270 = 176 I.C. 657 (P.C.).

Illustrations of Condition Precedent:—A bequest was made to N on condition of his residing in the testator's ancestral house, but N by his act rendered such residence impossible, he became disqualified to take under the will, *Shyama Charan v. Sarup Chandra* 17 C.W.N. 39; 14 I.C. 708. A bequest was made subject to the condition of a certain adoption being made, but the condition not being fulfilled the bequest failed, *Karamsi v. Karsandas*, 20 Bom. 718 (28 Bom., 271); Cf. *Egerton v. Brownlow*, 4 H.L.C. 1; *Probodh Lal v. Harish Candra*, 9 C.W.N. 309. A condition that the adopted son should be of good character and be obedient to the adoptive mother is a condition precedent to the adopted son taking under the will, and is not void for vagueness, *Surendra v. Kalachand*, 12 C.W.N. 668. Cf *Tatersal v. Howell*, (1816) Merival's Reports, 26. For instance of a bequest conditional on offering funeral cake, see *Kristo Soondery v. Rani Krishto*, (1863) Marsh, 367. A gift to wife and then to son who was directed to take the estate after performing the funeral obsequies of his mother was construed to give the son a vested interest and the performance of the obsequies was held not to be a condition precedent, *Narayan Iyer v. Subbarayya Dyyar*, A.I.R. 1929 Mad. 32—114 I.C. 558. For other instances of conditional bequests, see *Anuntmoyi v. Grish Chunder*, 7 Cal. 772 (on appeal, 14 J.A. 137: 15 Cal., 66); *Appuchetty v. Kuppammal*, 16 Mad. 366.

Bequest upon impossible condition:—If a bequest is made requiring the legatee to fulfil a condition precedent, the bequest will fail if the condition be incapable of performance. *Vide* the illustrations (i) and (ii) appended to the section. In a recent case, a bequest was made on the condition of the legatee's re-excavating a tank, but the testator in his life time re-excavated the tank himself, and thereby rendered the condition impossible of fulfilment, *held*, the bequest did not take effect, *Rajendralal Ghose v. Rakhal Das*, 48 Cal. 1100: 98 C.L.J. 418: 26 C.W.N. 878: A.I.R. 1922 Cal. 116: 64 I.C. 977; *Vide* also *Lowther v. Cavendish*, (1758) 1 Eden, 99 (116); *Priestly v. Holgate*, (1857) 3 K. & J. 286; but see *Darby v. Langworthy*, (1774) 3 Bro. C.C. 359, in which it has been held that if the impossibility of fulfilment arises from a subsequent act of the testator himself, the condition will be discharged and the bequest freed from it. It is on a principle somewhat akin to this that where a husband gave an annuity to his wife on condition of her residence in the family dwelling house to be built by the testator himself or his executor, and providing at the same time for forfeiture of the right to annuity in the event of her residing in her father's house, but the promised house was not erected and the contemplated residence was rendered impossible, the Court *held* that the widow would get the annuity if she lived anywhere excepting in her father's house, *Satish Chandra v. Sarat Sundari*, 38 I.C. 103 (Cal.).

127. [Suc. S. 114] A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

Bequest upon illegal or immoral condition.

Illustrations.

(i) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(ii) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void. [See *Wren v. Bradley*, 2 De G. & Sm. 49].

N. B.—This section applies to Hindus etc. and corresponds to sec. 25 of the Transfer of Property Act.

Illegal or immoral condition:—If the condition on which the bequest depends is *illegal* or *immoral*, the bequest fails. *Vide* the illustrations. Thus, if the condition requires the performance of an unlawful act, the bequest is void, *Mitchel v. Reynolds*, 1 P.W., 181; *Brannigan v. Murphy*, (1896) 1 Ir R. 418; similarly, a condition insisting on the continuance of immoral relations between the testator and the legatee invalidates the bequest, *Tayaramma v. Sitaramasumi*, 23 Mad., 613. But where the bequest is not prompted by a desire to continue immoral intercourse, but by a desire to do good to the issue of immoral intercourse with a mistress, a gift to her will not be void under this section, *Ram Sarup v. Bela*, 6 All., 313. Cf. *Man Singh v. Narayan Das*, 1 All. 476; *Lachmi Narayan v. Wilayati Begum*, 2 All. 483; *Dhiraj Kuar v. Bikramjit*, 3 All., 787; a condition insisting on desertion of husband is bad, *Wren v. Bradley*, *supra*; *Re Moore*, 39 Ch. D. 116; but a provision for a married woman in the event of her living separate from her husband is not so, *Re Hope Johnstone*, (1904) 1 Ch. 470; *Bedborough v. Bedbrough*, 34 Beav., 286. A condition restraining entry in naval or military service is bad being against public policy, *Beard v. Hall*, (1908) 1 Ch. 388. So is a condition in restraint of marriage. *In re Lanyon*, [1927] 2 Ch. 264. But a condition in *partial* restraint of marriage (e. g. when it forbids marriage with a Christian or non-Roman-Catholic, or a Mahomedan only, or forbids marriage for a particular time) is not so, *Hodgson v. Halford*, 11 Ch. D. 959; *Re Robinson*, (1897) 1 Ch. 85; *Re Bathe, Bathe v. Public Trustee*, (1925) 1 Ch. 377; *Galslope v. Ma In*, 151 I.C. 914 (Rang.). Thus, where a gift was made to a life-tenant and thereafter, to the life-tenant's three sons and one daughter (Flossie O'Cohen) with a provision that in the event of Flossie marrying before the death of the tenant for life, she would not take anything, the Court held that it was only a *partial* restraint on marriage as it did not penalise marriage *in toto* and was therefore not hit by this section and that the provision only operated to divest her of her vested interest to a fourth share, *Flossie O'Cohen v. Obediah Aaron Cohen*, 59 Cal. 102 = 54 C.L.J. 324 = A.I.R. 1982 Cal. 950 = 187 I.C. 482. A condition restraining the devisee from going to England is valid, Cf. *Perrin v. Lyons*, 9 East. 170; *Jenner v. Turner*, 16 Ch. D. 188; *Wynne v. Fletcher*, 24 Beav., 480. As to what conditions

Partial restraint of
marriage not illegal

are generally considered opposed to public policy, see *Re Morgain*; *Dawson v. Davsy*, (1910) 14 C.W.N. clxxv (175). A defeasance clause (under sec. 181, post) providing for lapse of legacy of a Parsi legatee upon his marrying a non-Parsi or a person not professing Zoroastrian faith has got nothing to do with the condition "contrary to law or to morality" as contemplated herein and circumscribing the validity of the legacy, and that these two things should not be confounded, *Korshed Maneck v. Official Trustee, Bombay*, 60 Bom. L.R. 106 = A.I.R. 1948 Bom. 819. As to how far provisions in a will which is partly for illegal purposes can stand, see *Universal Negro Imp. Assn. v. Ann Rebecca*, A.I.R. 1928 P.C. 119 = 115 I.C. 737 (P.C.).

128. [Suc. S. 115] Where a will imposes a condition to fulfilment of condition be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Illustrations.

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B, C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition. [See *Mercer v. Hall*, 4 Bro. C.C. 326].

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition. [See *Dawson v. Massey*, 2 Ch. D. 753; *Clarke v. Parker*, 19 Ves., 1].

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition. [See *Strange v. Smith*, Amb. 269].

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(vi) A makes his will whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect. [See *Clarke v. Berkeley*, 2 Vern. 720].

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy. [Cf. *Simpson v. Vickers*, 11 Ves., 841; *Re Gossling*, (1906) 1 Ch. 120].

N. B —This section applies to Hindus etc. It corresponds to sec. 26 of the Transfer of Property Act.

Substantial compliance amounts to fulfilment of condition precedent:— Where a bequest is dependent on the fulfilment of a condition precedent, such condition precedent, will be deemed to have been fulfilled if it has been substantially complied with, though not literally (Cf. *Robinson v. Wheelwright*, 21 Beav. 214). Thus, in the case of illustration (i), a general consent to the marriage, even by implication, will do, *Meicer v. Hall*, 4 Bro. C.C. 326; *Kesling v. Smith*, 44 Ch. D. 654; consent in this illustration will be necessary only for the first (and not subsequent) marriage, *Hutchison v. Hammond*, 3 Bro. C.C. 128; See *Taylor v. Austen*, 1 Drew., 459; but the condition will be fulfilled if the subsequent (instead of the first) marriage is with consent, *Beaumont v. Squire*, 17 Q.B. 905. Where the condition requires the consent of several persons, the condition is fulfilled if the consent of the survivors of them is taken [illus. (ii)]; but where all the persons are alive, consent of majority will not do, illus. (iii) and *Clarke v. Parker*, 19 Ves., 1 (24); consent once given validly (i.e., not under fraud, mistake etc.) cannot be retracted, illus. (iv); *Ingall v. Brown*, (1904) 1 Ch., 120; consent, if obtained subsequently to the marriage, is not compliance with the condition, vide illus. (v) and *Pollock v. Croft*, 1 Mer., 181. A condition that if the son marries a non-Roman Catholic he shall forfeit his interest is fulfilled by the baptismal of the wedded girl on the day of her wedding to Roman Catholic religion, *Galsloze v. Ma In*, 151 I.C. 814. A legacy was given to a person on condition of his remaining in a particular Company up to a certain age; the legatee joined His Majesty's forces with the said Company's consent, it was substantial compliance with the condition, *Re Cole, Cole v. Cole*, (1919) 1 Ch 218. No question of non-compliance arises where the testator himself modifies the condition as to such consent and himself approves of the marriage, see illus. (vi). This section cannot apply unless the condition is fulfilled at least substantially. Thus a condition requiring a release within a certain time is not fulfilled if the release is not executed within the prescribed limit, vide the cases against illus. (vii), *supra*. As to the necessity of fulfilling the condition, read *Dayamoyee Dassya v. Jatinara Chandra*

Das. 63 C.L.J. 201 = A.I.R. 1937 Cal. 23 = 168 I.C. 410. As to a specific instance of a condition being regarded as fulfilled, see *Re Grotrian*, (1955) 1 All. E.R. 788. As to what are or are not conditions precedents, read the notes at p. 265, *ante*; read also *Thakurain v. Thakur Dwarka*, 1953 S.C.J. 294 = A.I.R. 1953 S.C. 206 (the decision of this case is of doubtful accuracy).

129. [Suc. S. 116] Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator.

Bequest to A and on failure of prior bequest to B.

Illustrations.

(i) A bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect. [See *Murray v. Jones*, 2 V. & B. 918].

(ii) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and, if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect. [See *Avelyn v. Wood*, 1 Ves. Sen. 420].

N.B.—This section is applicable to Hindus etc. It corresponds to sec. 27, para. 1 of the Transfer of Property Act (IV of 1882). It has simply incorporated the rules of English law, *Durga Pershad v. Raghunandan*, 9 C.W.N. 419, and may be spoken of as having laid down what is very often known as the *Doctrine of acceleration*, that is when a prior disposition is made to depend on a condition and it is provided that on the failure of the prior disposition for non-fulfilment of the condition, the property is to go over to another person, the ulterior disposition, instead of failing on the failure of the prior disposition is rather accelerated and takes effect forthwith.

Bequest coupled with ulterior disposition in favour of another on failure of Prior Bequest:—When a bequest is made in favour of one person with an ulterior disposition of the same interest in favour of another on failure of the prior bequest, the second bequest takes effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator; *Okhymoni v. Nilmoney*, 16 Cal. 282. In this case there was a gift to the possible son of the testator (then *en ventre sa mere*) and in the event of such son dying before attainment of age, there was a gift over to the testator's brother. The possible child turned out to be a daughter; held the gift to brother took effect though the failure

of the first gift did not take place in the precise mode contemplated by the testator. Similarly, where the testator made a gift to a son to be adopted and provided that in the event of the death of such son without issue in the life time of his widow, the estate was to go to the daughters and their sons. The adoption failed and it was held that the executory gift to the daughters upon defeasance of the prior bequest took effect, although the defeasance of the prior bequest took place in a manner not contemplated by the testator, *Radhaprasad v. Ranimoni*, 89 Cal. 947 : 10 C.W.N. 695 : 8 C.L.J. 502 (on appeal to P.C. 86 Cal. 896 : 12 C.W.N. 729 : 8 C.L.J. 48 ; at a latter stage, 88 Cal. 158 : 16 C.W.N. 113 : 18 C.L.J. 183 ; on appeal, 20 C.L.J. 308). Again, where the testator contemplated that if his son died a minor and his widow survived him, she should take the property and after her his daughters. The deaths did not take place in the order set out by the testator, but the widow predeceased the son ; and notwithstanding such reversion of the order of events, the Court gave effect to the ulterior disposition in favour of the daughters, *Durga Pershad v. Raghunandan*, 19 C.W.N. 439 : 23 I.C. 597. See also *Jones v. Westcombs*, 1 Eq. Ca. Abr. 245, followed in *Okhoymoni's case, supra* ; *Avelyn v. Wood, supra* ; *Tenant v. Heathfield*, 21 H.L.R. 255 ; *Underhill v. Roden*, 8 Ch. D. 494 ; *Stanford v. Stanford*, 34 Ch. D. 362 ; *Mackinnon v. Sewell*, 2 M & K. 202 : 5 Sim. 78. As to when a substitutional gift takes effect under sec. 129 and does not get defeated by sec. 130, read *Srinilai v. Nazircevai*, 1956 S.C.J. 704 = 1956 S.C.A. 1009 = A.I.R. 1960 S.C. 747 (S.C.). For the case of a bequest in favour of charity on failure of bequest to grandson, read *Nimmalwar v. Appava Udayar*, I.L.R. (1960) Mad. 35 = A.I.R. 1960 Mad. 283. According to the Bombay Court, this section only contemplates the failure of a valid gift. So where the prior gift is void *ab initio*, the subsequent gift also fails in the manner indicated in sec. 116 of the Act, *Ismail Haji Arat v. Umar Abdulla*, I. L. R. (1942) Bom. 441 = 44 Bom. L.R. 256 = A.I.R. 1942 Bom. 166 = 201 I.C. 94. An ulterior disposition may become accelerated in consequence of a disclaimer on the part of the prior legatee to accept her interest under the will, *Azim Khan v. Sandat Ali Khan*, 8 O.W.N. 349 = A.I.R. 1931 Oudh, 177 = 186 I.C. 642, cited at p. 211, ante, or by the death of the prior legatee during the life-time of the testator, *Lakshmi Narasamma Ammal v. Anmanna Siddhanti*, 71 M.L.J. 845 = 1936 M.W.N. 902 = A.I.R. 1937 Mad. 26 = 168 I.C. 247.

130. [Suc. S. 117] Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner.

Illustration

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish

When second bequest
not to take effect on
failure of first.

together; under circumstances which make it impossible to prove that she died before him, the bequest to 'B' does not take effect.

N. B.—This section is applicable to Hindus etc. [See *Official Assignee of Madras v. Vedavalli Thayarammal*, 61 M.L.J. 182 = A.I.R. 1926 Mad. 936 = 97 I.C. 163]. It corresponds to sect. 27, para 2 of the Transfer of Property Act.

When Second Bequest not to take effect on the failure of the First :—This section is virtually an EXCEPTION to section 129. Under that section we have seen that upon defeasance of the prior bequest, the ulterior bequest takes effect although the mode of defeasance is other than that contemplated by the testator. But where the will shows an intention that the ulterior disposition is to take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition does not take effect unless the prior disposition fails in that manner. Thus, in *Underwood v. Wing*, 4 De G. M. and G., 639, a property was given to a wife with a condition that in case of her death before the husband the property was to go over to X; the husband and wife both died in the same shipwreck leaving it unascertained who died before. Here, the disposition in favour of X did not take effect. Vide also *Elliot v. Smith*, 22 Ch. D. 286; *Wing v. Angleve*, 8 H.L. 183; *Official Assignee of Madras v. Vedavalli Thayarammal*, supra. In *Ajudhia Bikhi v. Msmt. Rukmin*, 10 Cal. 428 (P.C.) the Judicial Committee have however held that prior disposition proving void the ulterior disposition is accelerated and not destroyed according to the DOCTRINE OF ACCELERATION. This was because no particular manner of failure was contemplated for the prior disposition. Cf. *Radha Prosad v. Ranimoni*, at p. 270, supra. Where a bequest was made to a minor son and it was provided that the property would go to the testator's sister in case his son would die after him, but the son died before the testator and the Court held that this section rather than sect. 129 would apply to the case and the gift to the sister would fail, *Subramania Padayachi v. Pakkiri Padayachi*, A.I.R. 1936 Mad. 119 = 154 I.C. 85. As to when a substitutional gift takes effect and does not fail under this section, read *Srinbai v. Nargase Vai*, 1956 S.C.J. 704 = 1956 S.C.A. 1009 = A.I.R. 1956 S.C. 747 (S.C.). The condition subject to which the gift over is to take effect must receive a strict construction, *Official Assignee v. Vedavalli Thayarammal*, 61 M.L.J. 182 = A.I.R. 1926 Mad. 936 = 97 I.C. 163.

131. [Sect. S. 118] (1) A bequest may be made to any person

Request over, conditional upon happening or not happening of specified uncertain event.

with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person."

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121, 122, 123, 124, 125, 126, 127, 129 and 130.

Illustrations.

(i) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A dies under 18. [See *Taylor v. Johnson*. 2 P.W. 506].

(ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.

(iii) A sum of money is bequeathed to A for life, and, after his death, to B; but if B shall then be dead, leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy, subject to be divested if he dies leaving a son in A's lifetime.

(iv) A sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money, and the representative of B takes the other half. [See *Harrison v. Foreman*, 5 Ves., 507].

(v) A bequeaths to B the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

*N. B.—*This section applies to Hindus etc. It corresponds to sec. 28 of the Transfer of Property Act (IV of 1882). The words "thing bequeathed" in this section mean the same thing as "interest" in sec. 28 of the T. P. Act, *Rameshwar Kuar v. Sheolal*, 14 Pat. 640—A.I.R. 1935 Pat. 401—166 I.O. 88.

Gift over on a Contingency:—This section makes provision for defeasance of a prior bequest by a condition subsequent, fulfilment whereof operates to vest the property in a subsequent devisee. Thus, a bequest is made to A with a provision that if A does not go to England within three years from the testator's death, then to B. A does not go to England within the prescribed time, his interest in the property ceases and the gift over takes effect. If there is no gift over as here,

there is intestacy with respect to the property and then the law of intestate succession applies. Cf. sec. 134, *post*. As to the divesting of estates by the happening or not happening of some future event or the superadded contingencies, see *Elliott v. Smith*, 22 Ch. D. 236; *Boulton v. Pilcher*, 29 Beav., 638; *Jagdeo Singh v. Deputy Commissioner, Partabgarh*, 2 Luck. 507 = A.I.R. 1926, Oudh, 481 = 96 I.C. 47; *Mst Tejo v. Chhape Ram*, A.I.R. 1956 Punj. 45; *Bai Dhonlaam v. Hari Prosad*, 46 Bom. 1098; 28 Bom. L.R. 498; 63 I.C. 87; *Nammalwar v. Apavu Udayor*, I.L.R. (1960) Mad. 95 = A.I.R. 1960 Mad. 288.

In a case before the Judicial Committee from Bengal the testator provided that on his death his two sons should as between themselves divide his estate half and half and that if subsequently any of the sons died sonless, the surviving son was to get the share of the son dying sonless, and the Calcutta High Court held that the specified uncertain event contemplated by the testator was death without son and that was to happen sometime after the death of the testator; therefore, it was a case of a vested interest and not contingent interest within the meaning of sec. 124, which applies only when no time is mentioned in the will for the occurrence of the contingency. It was a case of divesting a vested interest by superadding a condition within the meaning of this section. This condition happened just to terminate the interest of the son dying sonless, see *Akhy Kumar Ghose v. Indrarani Ghose*, 58 C.L.J. 417 = A.I.R. 1981 Cal. 499 = 196 I.C. 868. The Judicial Committee on appeal upheld the judgment of the High Court, cf. *Indira Rani v. Akhoykumar*, 59 I.A. 419 = 56 C.L.J. 423 = 87 C.W.N. 163 = 64 M.L.J. 48 = 1932 M.W.N. 1301 = 9 O.W.N. 1118 = A.I.R. 1932 P.C. 269 = 140 I.C. 498. P.C. If the superadded thing is not a contingency, this section will not operate and no question of gift over will arise or if it arises, it will be considered to be invalid, inasmuch as a testator can only defeat a prior bequest by a condition, but cannot will away the prior legatee's interest, read *Ananta Sayana v. Kondappa Naidu*, and *Purna Chandra v. Sudhangshu*, both cited at p. 260, *ante*. Read also the notes at p. 244, *ante*, under the heading, "Divesting of Defeasance of vested interest"; and read *Korshed Maneck v. Official Trustees, Bombay*, I.L.R. (1948) Bom. 609 = 50 Bom. B.L. 108 = A.I.R. 1948 Bom. 819, cited there. Death of a person is a certain and not a contingent event, although the time of death may not be so. Therefore, where a gift over is conditioned by death various complications may arise and in some case, the prior gift may remain unaffected (*Haradhan Ghose v. Dasarathi Mukhopadhyaya*, 67 C.L.J. 287; *Purna Ch. Dutta v. Sudhangshu S. Ghose*, I.L.R. (1946) 1 Cal. 1 = 49 C.W.N. 524) and in others it may be affected, read *Jarman On Wills*, 7th Ed. pp. 2079-80. Where a controversy arises as to whether forfeiture has been incurred in respect of the prior bequest, under this section, the Court generally leans towards the prior bequest and against forfeiture. Cf. *Hayward v. Jones*, 28 Beav. 523; *Hallifax v. Wilson*, 16 Vee., 168; *Partridge v. Baylis*, 17 C.D. 895. Thus, where the will provided forfeiture

of a bequest in the event of residence outside a place for more than 3 months, and the legatee resided elsewhere under police direction beyond the prescribed time limit, there was no forfeiture, as such forbidden residence was not voluntary but under duress. *Tinawri v. Krishnabhabini*, 20 Cal., 15. Cf. *Promrtha v. Nagendra-bala*, 8 C.L.J. 489 : 12 C.W.N. 808; *Mulji v. Bai Ujam*, 18 Wilful breach only 218; *Rajah Pirthoo v. Rani Raj Koer*, 12 B.L.R. 288; works forfeiture.

Girianna v. Honamma, 15 Bom., 269. It is the wilful breach only that works forfeiture. Cf. *Bhabatarini v. Pearylal*, 24 Cal. 646. Therefore, a violation of the condition of residence in the ancestral house will work forfeiture only if it is voluntary. *Shyama Churn v. Sarup Chandra*, 17 C.W.N. 39 : 14 I.C. 708; *Satish Chandra v. Sarat*, 38 I.C. 103 (Cal.). Comp. *Elizabeth Amabella B. Sifon v. Clifford Sifton*, A.I.B. 1938 P.C. 970-176 I.C. 657 (P.C.). [Condition of residence in Canada held to be void for indefiniteness]. On the same principle failure to take consent for marriage, because of the death of the person whose consent is necessary does not entail forfeiture of a prior bequest, *Re Brown's Will*, 18 Ch. D. 61. Cf. *Umasundary v. Sourabini*, 7 Cal. 288; *Baman Das v. Tarini*, 7 M.I.A. 169 (190); *Prasannamoyi v. Kadambini*, 7 B.L.R. (O.C.) 65. If the divesting contingency does not take place there is no defeasance of the prior bequest, *vide* illus. (iv) and *Harrison's case, supra*; also *Re Moir*; 25 Ch. D. 696; *Ganendra Mohun v. Jatindra Mohun*, 1 I.A. 387 : 22 W.B. 377 (P.C.). Thus, where a testatrix gave her estate to her son and daughter, providing that in the event of either of them dying unmarried the whole estate was to go to the other, and in the event of both dying unmarried, to a third person. Thereafter the son married and died leaving a widow; and afterwards the daughter died unmarried. Held, (1) the son and the daughter took absolute estate subject to defeasance on the happening of the contemplated contingency, but its happening was rendered impossible the moment the son married, and the vested interest of both the son and the daughter could not be divested. *Chatherine Mary v. Administrator-General*, 85 I.C. 664. A will provided that the testator's wife would be the *malik kansil* of the property "as long as she would remain chaste", and the condition of chastity was held not to be broken by re-marriage, *Harbux Singh v. Shanti Devi*, 16 Luck. 414-A.I.R. 1941 Oudh, 353-192 I.C. 53. There is nothing in Hindu Law repugnant to the divesting of estates, and the principle of this section can be applied to them in its entirety, of course subject to the other conditions of a valid bequest. Cf. *Udho Ram v. Mehr Chand*, 114 P.R. 1916; *Ratkishori v. Debendranath*, 16 I.A. 87 : 15 Cal. 409 (P.C.); *Amulya Charan v. Balidas*, 32 Cal. 861; Cf. also 24 Cal. 834 (P.C.); 12 Bom. 122 : 16 Cal. 883 (P.C.); 7 Cal. 304 (P.C.); 9 M.I.A. 128 ; 9 Cal. 952; *Ramadas v. Kakasi*, I.L.R. (1959) Kar. 1040-A.I.R. 1960 Kar. 189. A prior bequest is not affected by the invalidity of the ulterior bequest, *vide* sec. 183, *infra*. For other points on this subject, *vide* notes at pp. 268-69, *supra*, and read 1954 A.L.J. 180.

Where no breach, no forfeiture.

Gift over to Charity :—An immediate gift to a Charity with a gift over (on an event which may occur beyond the limit of perpetuities) to another charity, is not illegal. If the condition is neither impossible nor illegal, the gift over would come into operation on the non-fulfilment of the conditions, *Administrator-General v. Hughes*, 40 Cal. 192 : 21 I.C. 182.

Distinction between a defeasance clause and a repugnant clause :—Defeasance clause is a provision for terminating a vested interest on the happening or non-happening of a contingency. A repugnant clause does not contemplate any contingency, or any divestment on its happening or non-happening. It simply is the making of two inconsistent provisions, that is, saying one thing at one place and saying a different thing at another place. For instance, an absolute estate is conferred in one breath and in the next one, it is curtailed into a life estate. A defeasance clause takes effect according to its tenor, but the repugnant clause is ignored as void, read *Golak Behari v. Suradhanji Dasi*, I.L.R (1939) 1 Cal. 68 = 68 U L.J. 246 = A.I.R. 1939 Cal. 226 = 181 I.C. 705 ; read also the notes at pp. 184 & 260, ante.

Sub-sec. (2) :—It should be noticed that what is a condition *subsequent* with respect to a prior bequest, is a condition *precedent* with reference to an ulterior bequest; therefore all the rules about conditional bequests apply to it. Thus, a condition subsequent is bad if illegal, immoral or against public policy. Therefore prior bequests may be liable to forfeiture by such conditional limitations, as (1) bankruptcy (*Hurst v. Hurst*, 21 Ch. D. 278); (2) Change of religion (*Hodgson v. Halford*, 11 Ch. D. 959); (3) Change of residence, *Wynne v. Fletcher*, (24 Beav. 480; *Wolcott v. Batfield, Kay*, 694, and the cases at p. 276, and so forth. For this reason the ulterior bequest is said in this subsection to be subject to the rules contained in sec. 120 to 127 (both inclusive) and secs. 129 and 130. Section 128 which prescribes the doctrine of substantial compliance is not specified. Therefore, the superadded condition has to be strictly complied with (vide sec. 182, post, and the notes thereunder). In absence of such strict compliance the Court will always lean against forfeiture of the prior bequest, vide notes at p. 273, ante.

132. [Suc. S. 119] An ulterior bequest of the kind contemplated by section 131 cannot take effect, unless Condition must be strictly fulfilled, the condition is strictly fulfilled.

Illustrations.

- (i) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect. [See *Peyton v. Bury*, 2 P.W. 626; *Collett*, 85 Beav. 312].

(ii) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(iii) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that, if A dies under 18 or marries without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

N. B — This section applies to Hindus etc. It corresponds to sec. 29 of the Transfer of Property Act.

Divesting contingency to be strictly fulfilled:—A condition subsequent Difference between which can defeat a vested interest under sec. 181 cannot condition precedent and take effect unless it is strictly fulfilled. In this respect condition subsequent as regards the strictness it materially differs from condition precedent, for which required in their fulfilment the doctrine of substantial compliance has been laid down meat.

in sec. 128. *Vide* notes under "sub-sec. 2" of sec. 181. Unless the condition subsequent is strictly fulfilled, there is no forfeiture of the prior bequest, *vide* illus. (i) and also at pp. 273-74, *supra*; therefore, where there is a gift over on a contingency, the latter gift does not take effect unless the exact contingency happens, see *Re Boddington*, 25 Ch. D' 685; and the cases at p. 260, if the condition is once fulfilled, it is discharged, therefore in the case of marriage subject to consent, if the first marriage takes place with consent, a subsequent marriage need not be with consent, illus. (ii); also *vide* at p. 268. For cases where the condition subsequent is one requiring residence at a particular place, *vide* cases at p. 274; also *Wolcott v. Batfield*, Kay, 584 (550); *Parry v. Roberts*, 19 W.E. (Eng.) 378; *Bhabataram v. Pearylal*, 24 Cal. 646. A condition requiring residence in Canada was held to be void for uncertainty in *Elizabeth Aminella B. Sifton v. Clifford Sifton*, A.I.R. 1938 P. C. 270=176 I.C. 657.

[Suc. S. 120] If the ulterior bequest be not valid, Original bequest not the original bequest is not affected by it, affected by invalidity of second.

Illustrations.

(i) An estate is bequeathed to A for his life with condition superadded that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(ii) An estate is bequeathed to A for her life and, if she do not desert

her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.

(iii) An estate "is bequeathed" to A for life, and, if he marries to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 105, and A is entitled to the estate during his life.

N.B.—This section is applicable to Hindus etc. It corresponds to sec. 80 of the Transfer of Property Act.

Prior Bequest not affected by the invalidity of the ulterior Bequest:—

Void Gift over. Specific bequests good in themselves are not invalidated by a subsequent invalid disposition. *Khetter Mohun v. Gunga Narain*, 4 C.W.N. 671; thus, a bequest over is void being too remote, but original bequest will not be invalidated thereby: see *illus. (iii)* and *Lalit Mohun v. Chukkun Lal*, 24 I.A. 76 : 24 Cal. 894. Or, in other words, a prior disposition is not qualified by a subsequent illegal disposition. *Anandrao v. Administrator-General*, 20 Pom. 460. For other cases of 'void gift' over, see *Ring v. Hardwick*, 2 Beav., 362; *Ali Raza v. Nawazish Ali Khan*, 1938 O.W.N. 1167; *Krishnarao v. Beralias*, 20 Bom. 571 (595). A gift over, except as on a contingency, after an absolute estate is repugnant to the latter, and is void; read generally the notes and cases at p. 165, *ante*. If a gift over becomes void for remoteness or otherwise, the original gift, which such gift over purports to restrict, must necessarily become absolute. *Ali Raza v. Nawazish Ali*, 1938 O.W.N. 1167. A valid gift over is that comes after a life estate being the gift of the remainder, that remains undisposed of or unexhausted after the creation of the life estate; read *Govindbhai v. Dabyabhai*, 38 Bom. L.R. 175 = A.I.R. 1936 Bom. 201 = 163 I.C. 692. Read also the notes under the heading "Absolute estate" under sec. 188, *post*.

The principle of the Section applied to Hindu wills not subject to the Act:—The principle of this section was applied to certain old Hindu wills though the section itself did not apply to them, *vide Krishnarani v. Annada*, 4 B.L.R., (O.C.) 231; *Khetter Mohun v. Gunga Narain*, 4 C.W.N. 671 (677). Cf. 17 C.W.N. 39 : 14 I.C. 708.

Ulterior Disposition—when Invalid:—*Vide* notes under "sub-sec. 2" of sec. 181.

[Sec. S. 121] A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, specified uncertain event, or in case a specified uncertain event shall not happen, or not happen.

Illustrations.

(i) An estate is bequeathed to A for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood. He loses his life-interest in the estate.

(ii) An estate is bequeathed to A, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

(iii) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(iv) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.

(v) A fund is bequeathed to A for life, and, after his death, to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her shall cease to have any effect. B becomes a nun in the life-time of A. She thereby loses her contingent interest in the fund.

*N. B.—*This section applies to Hindus etc. inasmuch as Hindu law is not inconsistent with it. *Gopaladas v. Hemandas*, I L.R. (1942) Kar. 392—A.I.R. 1942 Sind. 145—208 I.C. 290. Compare it with sec. 31 of the Transfer of Property Act.

Object of the Section:—Under the English law, in cases of personality, if there is no gift over a condition subsequent is held to be void being *in terrorem* (i.e. by way of terrifying), so as to deter the legatee from doing something unpleasant to the testator.* But the Law Commissioners are of opinion that a condition subsequent ought to be valid, even without a gift over, vide, at p. 263, and this section is enacted to get rid of the English rule.

Divesting superadded Conditions:—This section illustrates the principle of forfeiture incurred by non-fulfilment of conditions subsequent. Vide the illustrations, which are very simple and require no word of explanation. In England such

* *Cooke v. Turner*, 15 M. and W. 727; *Pettifer v. Pettifer*, (1900) 5 C.W.N. xi (11).

superadded conditions are taken (in cases of personality) to be in *terrorem* and are therefore not given effect to. But the position is different in India, *vide* notes under the last paragraph. The most ordinary form of a divesting condition in this country is the direction for residence at a particular place. It has been held that a provision for defeasance of a bequest on the legatee's forsaking a particular residence is valid under this section, *Ambica Condition of Residence.*

Charan v. Sasitara, 22 C.L.J. 61 : 80 I.C. 868 —referring to *Tagore v. Tagore*, 1 I.A. 387 : 14 B.L.R. 60 ; *Bhabatarini v. Pearylal : Shyama Charan v. Sarup*, all cited at p. 274, *ante*. For a condition failing on the ground of uncertainty, read (1958) 1 All E.R. 357. But such abandonment of residence will not entail forfeiture when it is not voluntary but under duress, see 20 Cal. 15, and the other cases at p. 274. A forfeiture clause in a will that if a legatee disputes the will he will lose his benefit under it is not one in *terrorem*, but is a valid divesting condition, *Gopaldas v. Hemendas*, I.L.R. (1942) Kar. 392 = A.I.R. 1942 Sind, 45. As to other instances of divesting conditions, see *Bhoobunmohini v. Hurrish*, 5 I.A. 198 : 4 Cal., 23 ; *Umasundary v. Sourabini*, 7 Cal., 288 ; *Baman Das v. Tarini*, 7 M.I.A. 169 ; *Kristoromoni v. Narendra Krishna*, 16 I.A. 29 ; 16 Cal. 583. A gift was made to testator's son with a condition superadded that the son would

forfeit the gift in the event of his marrying certain persons,
Effect of absence of Gift over. held the son's estate was subject to defeasance on breach of the condition, *Re Balhe, Bathe v. Public Trustee*, (1926) 1 Ch. 377. A divesting condition must be valid in law. *Vide* sec. 135, *infra*. As this section does not contemplate a gift over, the result of forfeiture under this section is to pass the estate as on intestacy; that is, the estate goes as undisposed of. In this respect the law as enacted in this section is somewhat different from the English law. Under this latter law, in the absence of a gift over or a residuary gift, the condition operates as one in *terrorem*, (read the notes at p. 265, *ante*) and produces no divesting effect. But under the Indian law it entails forfeiture whether there is a gift over, or not, *Gopaldas v. Hemendas*, I.L.R. (1942) Kar. 392 = A.I.R. 1942 Sind, 145 = 208 I.C. 280. [N. B. In this case the will provided a forfeiture clause depriving a legatee disputing a will and the Court gave effect to the forfeiture, see *supra*]. The Calcutta Court in two cases held that in the absence of a definite provision for a gift over, the absolute interest does not become divested on the failure of the superadded condition, *Amulyacharan v. Kalidas Sen*, 32 Cal. 861 = 1 C.L.J. 270 ; *Chandidas v. Malinabala*, 41 C.W.N. 432. This view really means that the condition in the absence of a gift over is merely one in *terrorem* as under the English law. The Sind view is in greater conformity with the language of the statute and the opinion already expressed in this book. The section does not make a gift over the *sine qua non* for its applicability. The Calcutta Court has however later on come to depart from its former view and the English law, in *Golak Behari v. Suradhan*, I.L.R. (1939) 1 Cal. 63 = 68 C.L.J. 246 = A.I.R. 1939 Cal. 226 = 181 I.C. 705.

135. [Suc. S. 122] In order that a condition that a bequest

Such condition must shall cease to have effect may be valid, it is not be invalid under necessary that the event to which it relates be section 120. one which could legally constitute the condition of a bequest as contemplated by section 120.

N.B.—This section is applicable to Hindus etc. It corresponds to sec. 82 of the Transfer of Property Act.

The Divesting condition must be valid in law:—If the divesting clause is invalid, the bequest is not affected by it; for instance, where it is provided that the gift is to be divested in the event of an indefinite failure of male issue or of general failure of heirs (which is a void condition), the gift remains unaffected, *Lalit Mohun v. Chukkun Lal*, 24 I.A. 76 : 24 Cal. 884 : 1 C.W.N. 887 (P.C.). In (1968) 1 All. E.R. 808, the pertinent condition was held to be void for uncertainty.

136. [Suc. S. 123] Where a bequest is made with a condition

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject-matter to go over.
superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Illustrations.

(i) A bequest is made to A, with a proviso that, unless he enters the Army, the legacy shall go over to B. A takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(ii) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect.

N.B.—This section applies to Hindus etc. It corresponds to sec. 83 of the Transfer of Property Act. Compare this section with sec. 34 of the Contract Act.

Indefinitely postponing or rendering impossible fulfilment of condition subsequent:—When no time is fixed for fulfilment of the condition subsequent, if

the legatee does not fulfil it within a reasonable time or renders its fulfilment impossible by reason of his act, it will have the effect of accelerating the gift over.

English Law

Vide the illustrations above. With reference to illustration (ii) it should be noted that the English law on the point is somewhat different. Thus, in *Randall v. Payne*, 1 Bro. C.C. 55,* it was held that the marriage of A with a stranger did not preclude the possibility of his marriage with B's daughter, as he might survive his wife and then re-marry. For another illustration of rendering fulfilment of condition impossible by act or conduct see *Shyama Charan v. Sarup Chandra*, 17 C.W.N. 39 : 14 I.C. 708. In this case, the condition was one for residence in the ancestral house of the testator, but the executory devises joined with the life-tenant to effect a sale of the house in question and thereby rendered residence therein impossible.

137. [Suc. S. 124 Pro. S. 137] Where the will requires an

Performance of condition, precedent or subsequent, within specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of

the bequest is to go over to another person or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

N. B.—This section is applicable to Hindus etc. It corresponds to sec. 94 of the Transfer of Property Act with a slight modification. Under this section the effect of Fraud.

delay caused by fraud is excused without any qualification, but under sec. 84 of the T.P. Act, such delay is excused as against the author of the fraud. Cf. *Tincowri v. Krishnabhamins*, 20 Cal. 15. For the general law as to extension of time in consequence of fraud, see sec. 18 of the Limitation Act. Cf. *Brooke v. Garrod*, 3 K. & J. 608; *Simpson v. Vickers*, 14 Ves. 341.

Condition (precedent or subsequent) to be performed within specified time except in case of fraud:—Where the testator has fixed a time limit within which the condition (whether precedent or subsequent) for the bequest has to be fulfilled, the time becomes the essence of the whole thing, (see *Re Hartley*, 34 C.D. 742) and default in fulfilment of the condition within the specified time will be fatal except when such default is brought about by fraud, and in this latter case the original time will be enlarged by the period of delay (caused by the fraud). Cf.

* In this case the condition was a condition precedent, but the principle is the same.

Gorst v. Lwendes, 11 Sm., 434; *Lister v. Garland*, 15 Ves., 245; *Simpson v. Vickers*, supra; *Wilkins v. Knipe*, 5 Beav., 273. The provision of this section should be strictly followed, though it is very stringent, as is apparent from the words "must be," and the Court will not grant any relief against forfeiture entailed by violation of the section. Cf. *Austin v. Tawny*, L.R. 2 Ch., 143.

Ignorance or illness:—This section excuses delay in performance only if it is due to some fraud; so delay resulting from the legatee's ignorance of the condition, or his illness will not be excused; *Astley v. Earl of Essex*, L.R. 18 Eq. 290; *Re Hodge's Trusts*, L.R. 16 Eq. 92; *Doe d. Taylor v. Crisp*, 8 Ad. & E. 778.

CHAPTER XII

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

138. [Suc. S. 125] Where a fund is bequeathed absolutely Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person. to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

N. B.—This section is applicable to the Hindus etc. Its principle is very much similar to the principles of sec. 10 and 11 of the Transfer of Property Act, which deal with conditions restraining alienation and restrictions repugnant to interests created. It has been held that this section has got nothing to do with the creation of trusts, *Subhas Ch. Bose v. Gordhan Das Patel*, I.L.R. (1940) Bom. 254=42 Bom. L.R. 89=A.I.R. (1940) Bom. 76=187 I.C. 471. Notice however the words, "for the benefit of" occurring in the section.

Restriction on free enjoyment:—Where a bequest is given absolutely to any person, or for the benefit of any person, any condition in the will restricting the legatee's mode of enjoyment of the devised property is void. Cf. *Hancock v. Watson*,

(1902) A.C. 14. "Where there is a bequest of money to, or in trust for, legatees absolutely; but with a direction for the enjoyment or application of the money in a particular mode, for their benefit, as where it is given to purchase an annuity for the legatee, the legatee will be entitled to receive the capital money immediately, regardless of the particular modes directed for the enjoyment or application," *Knox v. Hotham*, 15 Sim., 82; *Bai Mamulhai v. Dossa Morarji*, 15 Bom., 443. The section covers the cases both (1) of an absolute bequest and (2) of a bequest for the benefit of the legatee. To attract the operation of the section the direction in question

must restrict the mode of enjoyment or application of "Fund"—what it includes. Cf. *Administrator-General v. Apear*, 3 Cal., 558.

The word "fund" here includes all kinds of legacies, whether moveable or immoveable, *Anantha Tirtha v. Nagamuthu*, 4 Mad., 200; *Mookundral v. Ganesh*, 1 Cal. 104.

Void Restrictions or Directions:—The following directions or restrictions are void under this section: (1) That the legatee should not enjoy the property for a certain period. *Lloyd v. Webb*, 24 Cal., 44; *Administrator-General of Madras v. Money*, 18 Mad. 448; *Ahmedbhoy v. Habibhoy*, 26 Bom., 819; *Yethirajulu v. Mukunthu*, 28 Mad. 363 (974); *Ranemoney v. Premmoney*, 9 C.W.N. 1033; *C. Lynnath v. Chundernath*, 8 Cal. 378; *Asit Kumar v. Pravash Chandra*, I.L.R. (1949) 1 Cal. 298 [postponing enjoyment for a number of years after majority]; *Gosavi v. Rivett-Carnac*, 13 Bom. 463; the principle of these cases will not however apply where there is no gift of immediate interest to the legatee, *Profulla Chunder v. Jogendranath*, 1 C.L.J. 608; 9 C.W.N. 528; also *Vullubdas v. Gordhandas*, 14 Bom., 860; *Motivahu v. Manubai*, 21 I.A. 93; 1 C.W.N. 366 (21 Bom. 709; 19 Bom. 647); *Kumar Purnendu v. Administrator-General*, 1953 S.C.J. 638 = A.I.R. 1954 S.C. 41;

Direction prohibiting alienation. (1954) 2 W.L.R. 186. (2) That the legatee shall not alienate the property, *Hemangini v. Nabin*, *infra*; *Tarakessur v. Soshi*, 10 I.A. 51; 9 Cal. 952; *Re Rosher*, 26 Ch. D. 801;

Jagat Singh v. Sangat Singh, 67 I.A. 179 = I.L.R. (1940) Lab. 330 = 52 C.L.J. 267 = 44 O.W.N. 569 = (1940) 2 M.L.J. 769 = 42 Bom. L.R. 697 = A.I.R. 1940 P.C. 70 = 187 I.C. 440 (P.C.); power of transfer is a natural incident of property and any restriction in derogation of such power is not allowable, *N. Ghose v. B. Dast*, A.I.R. 1922 Cal 302; *Sonataun Bysack v. Jugut Sondere*, 8 M.I.A. 66; *Shaw v. Ford*, L.R. 7 Ch. D 669; *Ananta v. Nagamuthu*, *supra*; *Rajomoyee v. Troylucko*, 29 Cal., 260; *Jugobandhu v. Dwarika*, 28 Cal. 446; *Krishna v. Vythianathn*, 18 Mad. 252; *Lala Ranjitswan v. D. I. Koer*, 24 Cal. 406; *Chimanrao v. Rambhan*, 4 Bom. L.R. 608; *Jehangir v. Kaikhusrus*, 13 Bom. L.R. 141 = 9 I.C. 951 (on appeal to P.C. 43 Bom. 88 = 25 C.W.N. 419); *Malaran v. Ajudhia*, 8 All. 452; 21 Mad. 425; 10 M.L.J. 208; *Thiru Vengada v. Nira Sinha*, (1941) 1 M.L.J. 489 = 1941 M.W.N. 273 = A.I.R. 1941 Mad. 591. Restriction on the power of alienation is repugnant to the absolute interest created and void in consequence, *Jwala Das v. Mt. Ghulam Fatima*, 31 Punj. L.R. 68

= 121 I.C. 298; *Kanhaya Lall v. Hira Bibi*, 15 Pat. 151 = A.I.R. 1936 Pat. 828 = 163 I.C. 940; *Msmt. Ram Kaur v. Atma Singh*, 8 Lah. 181 = 28 P.L.R. 355 = A.I.R. 1927

Direction prohibiting partition. Lab. 404 = 103 I.C. 606 (3) that the legatee should not divide or partition the property for a period or indefinitely, *Mookund Lal v. Ganesh*, 1 Cal. 104; *Hemangini v. Nabin*, 8 Cal. 788.

Compare *Rajendra v. Sham Chand*, 6 Cal., 106, where it was held that a covenant against partition between co-sharers is not binding upon the heirs; *vide also* 5 Cal. 59; 8 Cal. 578 (*supra*); 31 All. 3; 28 Cal. 72 (P.C.); 3 C.W.N. 126; *Ramalinga v. Virunakthi*, 7 Bom. 538; *Rai Kishori v. Debendra*, 15 I.A. 87 = 15 Cal. 409. As to whether partition can be prohibited for a limited period, see *Srimohan v. MacGregor*, (1901) 28 Cal. 769 (786) and *Poorendra v. Hemangini*, 36 Cal. 75; 12 C.W.N. 100. (4) That the devised property shall not be liable for the debts of the legatee, *Ashutosh v. Durga Churn*, 6 I.A. 182 = 5 Cal. 488; *Rai Kishori v. Debendra* (*supra*); (5) That the legatees should apply the money in some good work, *Bai Bipi v. Jamnadas*, 22 Bom. 774, or to some specified purpose, *Barton v. Cooke*, 5 Ves. 461; *Re Bowes*, (1896) 1 Ch. 507; *Annie Wilson v. Oakes*, 31 Mad. 283; *Tarakessur v. Soshi*, *supra*, or should apply some part of the income of the property in payment of an annuity, *Co-operative Central Bank v. Karamdas*, I.L.R. (1937) Nag 436 = A.I.R. 1937 Nag 106 = 169 I.C. 149. The Patna Court has held that a provision for the payment of annuity is not inconsistent with the absolute character of the gift. *Kanhaya Lall v. Hira Bibi*, 15 Pat. 151 = A.I.R. 1936 Pat. 828 = 163 I.C. 940, *supra*, and will not have the effect of cutting down the absolute estate already conferred on the donee. A direction to pay an annuity is not a mere pious wish, nor is it invalid, and obliges the donee, although given an absolute estate, to pay the annuity, *Avind Prasad v. Dulhin Kishori*, A.I.R. 1940 Pat. 254 = 185 I.C. 626.

Valid Restrictions:—*Comp. Chikrapan Jha v. Msmt. Hira Bibi*, 1954 A.I.J. 180—cited also under see. 131, ante.

Absolute Estate:—The section lays down the rule of universal application that where an absolute estate is granted no limitation (or repugnant condition) can be imported in the deed to derogate from the grant, *Raghunath Prasad v. Deputy Commissioner, Purnagarh*, 56 I.A. 372 = 4 Luck. 483 = 34 C.W.N. 61 = 58 M.L.J. 1 = 27 A.L.J. 1265 = 6 O.W.N. 861 = 30 L.W. 619 = A.I.R. 1929 P.C. 283, P.C.; *Jagat Singh v. Sangat Singh*, 67 I.A. 179 = I.L.R. (1940) Lab. 330 = 72 C.L.J. 287 = 44 C.W.N. 569 = (1940) 2 M.L.J. 769 = 42 Bom. L.R. 697 = A.I.R. 1940 P.C. 70 = 187 I.C. 440 (P.C.). [Restraint on alienation by holder of absolute interest held to be void]; there can be no cutting down of an absolute gift declared by an earlier clause of the will by means of a subsequent clause, *Gawri Prasad v. Raj Rani*, 43 P.L.R. 357 = A.I.R. 1941 Lah. 286 = 196 I.C. 177; *Bishan Devi v. Jagat Singh*, 39 P.L.R. 591 = A.I.R. 1937 Lah. 353; *Ramadas v. Kalliani*, I.L.R. (1959) Ker. 1040 = A.I.R. 1960 Ker. 183; *Venkatesubba v. Mylavaramu*, A.I.R. 1956 Andhra Pra.

447. Where an absolute grant is made with a clause added that the legatee should pay annually a certain amount of the income of the property to a certain institution, the Court held the condition to be repugnant to the interest created and therefore void and ineffective to create a charge in favour of the institution, *Co-operative Central Bank v. Karamdas*, I.L.R. (1937) Nag. 436 = A.I.R. 1937 Nag. 106 = 169 I.C. 149; but see *Kanhaya Lall v. Hira Bibi*, *supra*. Cf. (1940) 2 M.L.J. 510; A.I.R. 1949 Mad. 690. As to what grants convey an absolute estate, see *Fateh Chand v. Rup Chand*, 43 I.A. 183 : 38 All. 446 : 26 C.L.J. 182 : 21 C.W.N. 102 : 18 Bom. L.R. 900 : 37 I.C. 122 (P.C.) ; [cited at 146, ante] ; *Irvine v. Sullivan*, L.R. 8 Eq., 673 ; *Kamikhyatram v. Kushal Chand*, 61 I.A. 145 = 9 Luck. 349 = 59 C.L.J. 214 = 38 C.W.N. 477 = 36 Bom. L.R. 399 = 1934 A.L.J. 299 = 66 M.L.J. 294 = A.I.R. 1934 P.C. 72 = 147 I.C. 1133 (P.C.) ; *Jehangir v. Kaikhushru*, 18 Bom. L.R. 141 : 9 I.C. 951 (on appeal to P.C. 43 Bom. 88 : 23 C.W.N. 419) ; *Bradley v. Peixotto*, 3 Ves., 325 ; *Raj Kishore v. Jaint Singh*, 36 All. 387 : 12 A.L.J. 717 : 23 I.C. 364 ; *Gunga Baksh v. Gokul Prosad*, 4 O.L.J. 744 ; 44 I.C. 646 ; *Bathazar v. Samuel*, 21 C.W.N. 992 : 42 I.C. 285 ; *Nistarini v. Behary Lal*, 19 C.W.N. 62 : 27 I.C. 289 ; *Richard Ross v. Naunilal*, 35 A., 211 : 17 C.L.J. 555 (P.C.) ; *Ayyanatha v. Aiamanthochi*, 21 M.L.J. 73 : 6 I.C. 533 ; *Tagore v. Tagore*, 9 B.L.R. 377 : 18 W.R. 950. The word "absolute" does not necessarily create an absolute estate, *Irvine v. Sullivan*, *supra* ; *Advocate-General v. Hormuji*, 29 Bom. 375 : 7 Bom. L.R. 236 ; *Comiskey v. Hanbury*, 9 C.W.N. xciii ; so words of inheritance do not necessarily confer an absolute interest, see *Dharani Kanta v. Siba Sundari*, 35 Cal. 1069 ; and also at p. 187, ante Cf. *Huliburton v. Administrator-General*, 21 Cal. 488. Where an absolute estate is given to the legatee the mere fact that there are certain void restrictions or qualifications in the Will, will not affect the legatee's position, *Rameswar v. Lachmi Prasad*, 31 Cal., 111 : 7 C.W.N. 688 ; *Atul Krishna v. Sanyasi Charan*, 32 Cal., 1051 : 9 C.W.N.

No gift over in curtail-
ment of absolute
interest. 784 ; nor will a subsequent gift over have the effect of
cutting down the absolute estate, *Pastap Chand v. Mt.
Makhri*, 14 Lah. 485 = 34 P.L.R. 73 = A.I.R. 1933 Lah. 365 =
144 I.C. 651 ; *Rameshwar Baksh v. Balraj Kuar*, 40 C.W.N. 8 = 37 Bom. L.R.
862 = 1935 M.W.N. 1122 = 1935 A.L.J. 1188 = 37 P.L.R. 666 = A.I.R. 1935 P.C.
187 = 157 I.C. 888 (P.C.) ; *Bhupati Charan v. Chandi Charan*, 39 C.W.N. 390 =
A.I.R. 1935 Cal. 154 = 156 I.O. 241 ; *Suresh Chandra Palit v. Lalit Mohan*, 12 C.L.J.
316 = 20 O.W.N. 403 = 31 I.C. 405 — relied on in *Haradhone Ghose v. Dasarathi
Mukhopadhyaya*, 67 C.L.J. 237 = A.I.R. 1999 Cal. 38. For other cases, read the
notes at p. 185, ante ; also *Mrsmt. Ram Kaur v. Atma Singh*, 8 Lah. 181 = 28 P.L.R.
355 = A.I.R. 1927 Lah. 404 = 103 I.C. 506. An absolute estate can be cut down
only by clear and unambiguous words to the contrary, *Karan Singh v. Rupwanti*,
6 Lah. L.J. 412 = A.I.R. 1925 Lah. 122 = 85 I.C. 296. Any restriction or limitation
repugnant to the absolute estate or any subsequent gift inconsistent therewith
will be of no legal effect *Umrao Singh v. Baldey Singh*, 14 Lah. 363 = 34 P.L.R.
665 = A.I.R. 1933 Lah. 201 = 143 I.C. 615. When an absolute estate is created

by the will and then repugnant conditions are imposed in derogation of that estate, the latter conditions will be void and of no legal effect. *Raghunath Prasad v. Deputy Commissioner, Partabgarh*, 56 I.A. 972=4 Luck. 483=34 C.W.N. 61=68 M.L.J. 1=27 A.L.J. 1265=30 L.W. 619=6 O.W.N. 864=A.I.R. 1929 P.C. 988, P.C.; also read *Satya Ranjan v. Annapurna Dasi*, 48 C.L.J. 623=A.I.R. 1929 (al. 145=114 I.C. 666). What the law prohibits is the creation of an absolute estate and the cutting down of the grant by a condition. It does not prohibit the fastening of a charge on a property and then giving away of that charged property. *Comp Lakhna v. Sitaram*, 1937 A.L.J. 846=A.I.R. 1937 All. 705=171 I.C. 687. Thus, it will be quite permissible to fasten an obligation to maintain the testator's wife on the donee of an absolute estate, because what the donee here gets is an estate burdened with an obligation, *Jaduram v. Ramdassi*, 62 L.W. 719=A.I.R. 1949 P.C. 804. A bequest to daughters with right of alienation *inter se* and not in favour of strangers is a gift without any reservation and the absolute nature of the gift is not cut down, *Ganshamdass v. Saraswati*, 1925 M.W.N. 285=A.I.R. 1925 Mad. 561=87 I.C. 621. After an absolute dedication has been made in favour of an idol, thereafter it will not be possible for the testator to give a direction that the surplus income from the property will go over to the members of his family, *Anand Chhan v. Kamala Sundari*, 66 C.L.J. 88=A.I.R. 1936 Cal. 405=166 I.C. 892. A gift over may come after a life estate or a limited interest being the gift of the undisposed of remainder after the grant of the life-estate, *Gorinalalbhai v. Dahyabhai*, 88 Bom. L.R. 175=A.I.R. 1936 Bom. 201=163 I.C. 682. From what has been stated above, it is apparent, that there may be a number of successive life-estates but not of successive absolute estates, Cf, *Nisar Ali v. Mahomed Ali*, 69 I.A. 268=56 C.L.J. 36=36 O.W.N. 937=A.I.R. 1932 P.C. 172=187 I.O. 839 (P.C.).

When this Section will not apply :—It is an accepted principle of law that the testator can suspend or restrict the mode of enjoyment within certain limits (*Re Macleay*, L.R. 20 Eq 190), e.g. he can suspend enjoyment during the minority of the legatee. Cf. *Asit Kumar v. Pronash Chandra*, 1 L.R. (1949) 1 Cal. 298. He can also suspend enjoyment by withholding the vesting of immediate interest in the legatee, *Purnendu Nath v. Administrator-General*, (1953) S.C.J. 638=A.I.R. 1954 S.C. 41 (S.C.). Cf. *Profulla v. Jogendra*, *supra*. Where the testator does not pass the estate immediately a restrictive condition will not be void, *Shookmoy v. Monohari*, 12 I.A. 103; 11 Cal 684; *Vulluldas v. Gordhan-das*, *supra*. This section will not also apply unless the bequest is absolute or is for the benefit of the legatee, *vide Knox v. Hotam*, *supra*. The section does not apply to a case where the bequest is of the life-interest. The word, "absolutely" in the section qualifies not only the first part, namely, the word "bequeathed" but also the latter part consisting of the words "for the benefit of the person". *Kedar Nath Poddar v. Gaya Nath Poddar*, 62 C.L.J. 165=A.I.R. 1950 Cal. 731. A condition securing mutual rights of pre-emption among the members of family

seems to be valid, *Re Macleay's case, supra*; *Dos d. Gill v. Pearson*, 6 East 173; but see *Attwater v. Attwater*, 18 Beav., 300. The word "shall" in the section necessarily makes it inapplicable where the restrictions are recommendatory and not mandatory, *Kanhaya Lall v. Hira Bibi*, 15 Pat. 151—A.I.R. 1936 Pat. 823—163 I.C. 940. As to how far the donee of an absolute estate can be bound by a condition to provide residence and maintenance to the testator's wife, *vide Jaduram v. Ramdasi*, 62 L.W. 719—A.I.R. 1949 P.O. 304—cited under the last heading.

139. [Suc. S. 126] Where a testator absolutely bequeaths

Direction that mode
of enjoyment of abso-
lute bequest is to be
restricted, to secure
specified benefit for
legatee.

a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

Illustrations.

(i) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(ii) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

N. B.—This section applies to Hindus etc. :

The Principle of the Section :—If a testator leave a legacy absolutely as regards his estate, but restrict the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails, *Lassence v. Tierney*, 1 Mac. & G. 551—followed in *Administrator-General v. Apoor*, 3 Cal. 553; see also *Kellett v. Kellett*, 3 H.L. 160. Thus, where a sum was bequeathed with a direction that it should be applied in the purchase of a commission in the army, but the system of commission purchase being abolished by Royal warrant, it was held that the legatee was entitled to the sum bequeathed, *Palmer v. Flower*, L.R. 13 Eq 260. Cf. *Haliburton v. Administrator-General*, 21 Cal., 488; *Re Currie's Settlement*, (1910)

1 Ch. 329; *Re Cornells' Settlement*, (1915) 1 Ch. 167. Where the trustees are directed to divide the estate into as many equal shares as there may be daughters at the testator's death and to pay the income of each share to each daughter during her life, it was held that the interest taken by the daughters did not amount to an absolute bequest as understood in this section, *Soundara Rujan v. Natarajan* 52 I.A. 810 = 48 Mad. 906 = 23 A.L.J. 1010 = 43 C.L.J. 70 = 80 O.W.N. 434 = 28 Bom. L.R. 204 = 1926 M.W.N. 22 = A.I.R. 1926 P.C. 244 = 92 I.O. 289 (P.C.). Again, where a testatrix bequeathed her estate equally to her two grandsons, A and B, but directed the executors to hold B's share and pay B maintenance only and to give him the corpus of his moiety if he reformed himself or to give it to B's widow or issue as B would appoint, the Court held (1) the gift to B was absolute, (2) but his mode of enjoyment was restricted; he could enjoy maintenance only until he reformed himself, with power to appoint to his widow or issue, *Bachar Akha v. Da Cruz*, 19 Bom. 221 and 770. *Vide illustration (i), above.*

Analysis of the Section:—(i) There should be an *absolute bequest severing* the fund from the testator's estate : (2) There should be a direction restricting the mode of enjoyment so as to *secure a benefit* for the legatee ; and (3) the specified benefit fails. The condition of *severing* is necessary, as otherwise the legacy will fall into the residue of the testator's estate. Cf Sec. 140, *infra*. The fund being so severed it is considered as part of the legatee's estate and not that of the testator's estate. It is for this reason that the *fund* under this section belongs to the legatee, whereas under sec. 140, post, it remains a part of the testator's estate. Cf. *Lassence's case*, *supra*; *vide also Hancock v. Watson*, (1902) A.O. 14. *Re Harrison*, (1918) 2 Ch. 59. For other cases see *Whittell v. Dudin*, 2 J. & W. 279; *Maryoseph v. Maryoseph*, (1920) 2 Ch. 33; *Re Harrison Hunter*, 87 I.J.O., 483; *Soundara Rujan's case*, *supra*. This section has no application where the gift is followed by directions amounting to trusts, *Subhas Chandra Bose v. Gordhan Das*, I.L.R. (1940) Bom. 254 = 42 Bom. L.R. 89 = A.I.R. 1940 Bom. 76 = 187 I.O. 471.

140. [Suc. S. 127] Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and of which cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

Illustrations.

(i) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall

divide the principal among his children. The son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(ii) A bequeaths the residue of his estate, to be divided equally among his daughters with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

N. B —This section applies to Hindus etc.

Analysis of the Section:—The following are the pre-requisites for the application of the section : (1) There is no *absolute* bequest severing the legacy from the testator's estate : (2) the bequest is given for certain purposes, and (3) part of those purposes cannot be fulfilled. When these conditions are fulfilled the consequence will be that the unexhausted portion of the legacy will remain a part of the testator's estate. Where the testator gives all his property to his wife *absolutely* with full power to dispose of the same according to her wishes, the case would not come under this section, *Re Hutchinson*, 8 Ch. D. 840. Cf. *Le Merchant v. Le Merchant*, L.R. 18 Eq. 414; *Re Hamilton*, (1895) 2 Ch. 370. Where a bequest is made subject to a trust, and the income of the property is sufficient to meet the expenses mentioned in the will the bequest takes effect and there will be no intestacy, *Swaminatha Pillai v. Duraisami Pillai*, A.I.R. 1927 Mad. 681—101 I.C. 82. Read *Siva Swami Aiyar v. Thirumudi Chettiar*, 57 M.L.J. 219—A.I.R. 1930 Mad. 405—118 I.C. 499.

Legacy severed from the Testator's Estate:—If the legacy is absolute and severed from the testator's estate, it belongs to the legatee and is to be applied for his benefit (specified by the testator), and if the specified benefit is unattainable, the legacy belongs to him freed from all restrictions, *vide* sec. 139. In this section we have the reverse position; here the legacy is not given absolutely, nor severed from the testator's estate, the direction being only to apply it for certain purposes. If such purposes fail the legacy (or unexhausted part of it) remains a part of the testator's estate.

Certain Purposes:—In order to render this section applicable the legacy should be given for *certain purposes*, that is to say, the testator is to indicate to what object the bequeathed fund is to be applied. This he can do by express directions or by giving a direction by implication or by making use of *precatory* words, that is, words of recommendation, request, entreaty, wish or expectation. The persons to carry out his directions or wishes are his trustees. When the purposes for which the legacy is given cannot be fulfilled, the trust fails and the trust property remains a part of the testator's estate. The trust can be created by express words or by implication, and is accordingly called express or implied

trust. A trust can be implied in different modes, one of the modes being the use of precatory words, see *Greedharsee v. Nando*, 11 M.I.A. 504. Thus, where a testator declared that the debt due from an attesting witness should not be claimed, but it was to be applied for the education of the children of that witness; held, there was no release of the debt, but a valid trust for the children, *Administrator-General v. Lazar*, 4 Mad. 244.

Precatory Trust :—Is, as we have seen, an implied trust created by words of recommendation etc. As a recommendation or an entreaty may be of different degrees of strength, varying from a mere pious wish to a positive command, questions often arise as to what precatory words give rise to a trust. The decided cases lay down the following propositions with respect to this matter : (1) there is no trust unless the precatory word is imperative, *Kumara Sami v. Sulbaroya*, 9 Mad. 325 ; *Natha v. Dhunbaji*, 28 Bom. 1 ; *Mussoorie Bank v. Raynor*, 4 All., 500. (2) There is no trust where the word used gives the trustee a discretion or option, *Administrator-General v. Lazar*, 4 Mad. 244 ; *Kumarasami's case, supra*; in this case the testator said "you should give brothers, their wives and children, according to your wishes"; and the Court held that these words were not sufficiently imperative and too uncertain to create a trust; but see *Re Burley*, (1910) 1 Ch., 215 : (3) The Court leans against construing precatory words as trusts, *Lamle v. Eames*, L.R. 10 Eq. 267 ; *Hill v. Hill*, (1897) 1 Q.B. 483. Thus, where a testatrix declared, "I desire M to pay every month Rs. 644/- to my dependants and servants as detailed below," it was held that these words (coupled with others) did not constitute a precatory trust, *Suleman v. Kadar*, 8 I.A. 117 : 8 Cal. 1 ; also see *Hanbury v. Fisher*, (1904) 1 Ch. 445 ; *Re Oldfield*, (1904) 1 Ch. 549. For a trust to arise out of precatory words, the Court must be satisfied of the definite intention of the testator to create a trust.

Words to create a Precatory Trust :—As to what words are sufficient to create such a trust, see *Tibbets v. Tibbets*, 19 Ves. 656 ; *Ford v. Fowler*, 8 Beav. 146 ; *Irvine v. Sullivan*, L.R. 8 Eq. 679 ; *Godfrey v. Godfrey*, 11 W.R. (Eng.) 534 ; *Liddard v. Liddard*, 28 Beav. 266 ; *Parsons v. Boller*, 18 Ves., 476 ; *Harding v. Glyn*, 1 Atk. 469 ; *Harland v. Trigg*, 1 Bro. C.C. 142.

Secret Trusts :—That is, trusts not committed to writing, but communicated to the legatee desiring him to hold the legacy in trust. The onus of proving a secret trust is on the party setting it up. For cases relating to this subject, see *Re Pitt Rivers*, (1902) 1 Ch. 403 ; *Kalioharan v. Ram Chandra*, 30 Cal., 788 ; *Louis v. Coelho*, 31 Mad. 187.

Essentials of a Trust :—Three CERTAINTIES are necessary for the creation of a trust. (1) words imperative and certain, & all. 500 (*su;ra*) ; 9 Mad. 325 cited above, (2) a subject matter which is certain, *Comiskey v. Hanbury*,

(1905) A.C. 84; *Re Conolly*, (1910) 1 Ch. 219; *Re Burley*, (1910) 1 Ch. 215; *Green v. Marsden*, 1 Drew. 647, and (3) an object which is certain: *vide Gokoolnath v. Issur Lochun*, 14 Cal., 222. In this case the testator directed the surplus money (after the erection of a temple) to be applied for "just acts for the testator's benefit" and the Court held that the words were too uncertain to create a precatory trust.

CHAPTER XIII

OF BEQUESTS TO AN EXECUTOR.

141. [Suc. S. 128] If a legacy is bequeathed to a person

I legatee named as executor cannot take unless he shows intention to act as executor.

who is named an executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor.

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor. [See *Harrison v. Rawley*, 4 Ves., 212].

N. B — This section is applicable to Hindus etc.

Bequest to an Executor:—A bequest to an executor is conditional on his taking out probate or his accepting the office of such executor. See *Harrison Rawley, supra*; *Re Hawkins's Trusts*, 33 Beav., 570. The executor's intention to act as such must be manifest under this section. Cf. *Lewis v. Mathews*, L.R. 8 Eq. 277. To attract the operation of this section, the person must be named as an executor of the will; so if a legatee is named as an executor he cannot take unless he manifests an intention to act as an executor, *Prosanna v. Administrator-General*, 15 Cal., 83. The prohibition of the section is not to be stultified by a search in the reason for which the testator made the bequest, *Rajam v. Pankajam Ammal*, I.L.R. (1944) Mad. 821 = 1944 M.W.N. 208 = (1944) 1 M.L.J. 261 = A.I.R. 1944 Mad. 336 = 220 I.C. 322. Under the English law, it is a question of natural presumption that a bequest to a person named as an executor is given in that character, (see *Re Appleton*, 29 C.D. 898) and such presumption being rebuttable is precluded by evidence (see *Stockport v. Howell*, 19 Ves., 417). But under this section, its language being peremptory, it is not a question of presumption and consequently, parol evidence by way of rebuttal is inadmissible, 15 Cal. 89 (*supra*).

Inability to prove the Will by reason of physical disability (e.g., insanity, illness, absence etc.) is no excuse, *Hansbury v. Spooner*, 6 Beav. 680; *Re Hawkins's Trust, supra*. This section does not apply to the case where a legatee is named as an executor but does not prove the will by reason of his death, *Rama Sami v. Kuppu Sami*, 18 M.L.J. 361 (1957).

Minor Executor:—It is sufficient compliance with this section if the minor accepts office on attaining majority, *Re Gardner*, 67 L.T. 552.

Proves the Will:—In order to attain a qualification under this section the executor can prove the Will at any time before the estate is fully administered, *Harrison v. Rowley, supra*; *Lewis v. Matthews, supra*.

CHAPTER XIV

OF SPECIFIC LEGACIES.

142. [Soc. S. 129] Where a testator bequeaths to any specific legacy defined, person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Illustrations.

(i) A bequeaths to B—

"the diamond ring presented to me by C":

"my gold chain":

"a certain bale of wool":

"a certain piece of cloth":

"all my household goods which shall be in or about my dwelling house in M. Street, in Calcutta, at time of my death":

"the sum of 1,000 rupees in a certain chest":

"the debt which B owes me":

"all my bills, bonds and securities belonging to me lying in my lodgings in Calcutta":

"all my furniture in my house in Calcutta":

"all my goods on board a certain ship now lying in the river Hughli":

"2,000 rupees which I have in the hands of O":

"the money due to me on the bond of D":

"my mortgage on the Rampur factory":

"one-half of the money owing to me on my mortgage of Rampur factory":

"1,000 rupees, being part of a debt due to me from C":
 "my capital stock of 1,000, in East India Stock";
 "my promissory notes of the Central Government for 10,000 rupees
 in their 4 per cent. loan";
 "all such sums of money as my executors may, after my death, receive in
 respect of the debt due to me from the insolvent firm of D and
 Company";
 "all the wine which I may have in my cellar at the time of my death";
 "such of my horses as B may select";
 "all my shares in the Imperial Bank of India";
 "all my shares in the Imperial Bank of India which I may possess at the
 time of my death";
 "all the money which I have in the 5½ per cent. loan of the Central
 Government";
 "all the Government securities I shall be entitled to at the time of
 my decease."

Each of these legacies is specific.

(ii) A, having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell" for the benefit of B. The legacy is specific.

(iii) A having property at Benares, and also in other places, bequeaths to B all his property at Benares. The legacy is specific.

(iv) A bequeaths to B—

- his house in Calcutta;
- his zamindari of Rampur;
- his taluk of Ramnagar;
- his lease of the indigo-factory of Salkya;
- an annuity of 500 rupees out of the rents of his zamindari of W.

A directs his zamindari of X to be sold, and the proceeds to be invested for the benefit of B.

Each of these bequests is specific.

(v) A by his will charges his zamindari of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zamindari to D. Each of these bequests is specific.

(vi) A bequeaths a sum of money—
 to buy a house in Calcutta for B;

to buy an estate in zila Faridpur for B;
 to buy a diamond ring for B;
 to buy a horse for B;
 to be invested in shares in the Imperial Bank of India for B;
 to be invested in Government securities for B.

A bequeaths to B—

"a diamond ring":
 "a horse":
 "10,000 rupees worth of Government securities":
 "an annuity of 500 rupees":
 "2,000 rupees to be paid in cash":
 "so much money as will produce 5,000 rupees four per cent. Government securities."

These bequests are not specific.

(vii) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C and directs that it shall be paid out of property which he may leave in England. No one of these legacies is specific.

N. B.—This section is applicable to Hindus &c.

Specific Legacy :—It means the bequest of a *specified* severed and distinguished part of the testator's property, *Bothamley v. Sherson*, L.R. 20 Eq. 304. A specific legacy is something which a testator identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates it in favour of a particular legatee from the general mass of his personal estate, *Robertson v. Broadbent*, 8 Ch. D. 812. As to the TEST of a specific legacy, see *Narman v. Narman*, (1919) 1 Ch. 207; *Swarnalata Bose v. Promode Chandra Roy*, 63 C.W.N. 227 = A.I.R. 1959 Cal. 268. Comp. *Re Sherman v. Pearce*, (1954) 1 All E.R. 693.

General Legacy :—It means a bequest of something out of the testator's *general estate*, not amounting to a bequest of any particular or specific thing distinguished from all other parts of the testator's estate.

Demonstrative Legacy :—*Vide* sec. 150, *infra*. As to when a legacy would be demonstrative and not specific, consult, *Rajani Kanta v. Kiko Ratilal*, 84 Bom. L.R. 1124 = A.I.R. 1932 Bom. 506 = 140 I.C. 206; *Swarnalata v. Promode Ch.* 63 C.W.N. 227 = &c., *supra*. Where the testator directed by his will that "after the amount due in respect of lands sold under oral agreements has been received, a

sum of Rs. 10,000 to his wife and a sum of Rs. 4,000 to his daughter should be paid. Held that the legacies were demonstrative and not specific, *Ibid*; Comp. Illustration VII, above. Cf. *Bhagirathibai v. Advocate General of Bombay*, 89 Bom. L.R. 497 = A.I.R. 1937 Bom. 884 = 171 I.C. 341.

Distinction between General and Specific Legacies:—The distinction between the two is of great importance, as they have their distinctive and peculiar advantages and disadvantages. "These specific legacies have in some respects the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage," *Ashton v. Ashton*, 3 P. Wms. 315. Thus, under sec. 149, in case of deficiency of assets, a specific legacy is not liable to abate with the general legacies; but it may fail by ademption* under Ch. XVI of this Part without any prospect of being compensated or satisfied out of the general estate. Again, a specific legacy fails when the thing bequeathed does not exist; whereas in case of a general legacy, the executor under such a circumstance, is bound to procure a similar thing for the legatee, *vide* sec. 171, *infra*.

Distinction between Specific and Demonstrative Legacies:—*Vide* EXPLANATION of sec. 150, *post*. The true test for determining whether a particular bequest is specific or demonstrative has been laid down in the *Explanation* to sec. 150, *post*, read *Bhagirathibai v. Advocate General of Bombay*, 89 Bom. L.R. 497 = A.I.R. 1937 Bom. 884 = 171 I.C. 341.

What are or are not Specific Legacies.—A bequest of the testator's personal estate, generally, is not specific, *Williams on Executors*, (11th Ed) 1928; but a bequest of immoveable property is regard as specific, *Forrester v. Leigh*, Ambl., 173; *Hensman v. Fyer*, L.R. 3 Ch. 420; *Lancefield v. Iggleston*, L.R. 10 Ch. 186. Cf. *Page v. Leapingwell*, 18 Ves., 463. Though personal property described in general terms, does not imply a specific legacy, yet when described by a qualifying clause it may be specific. Thus, the testator's personal property "at Calcutta" may form a specific legacy. Cf. *Sayer v. Sayer*, 2 Vern. 688; *Gayre v. Gayre*, 2 Vern., 538. Cf. *Re Silverwright*, (1921) W.N. 338. A debt due to the testator, if released, is considered as specific legatee to the debtor, *Re Wedmore*, (1907) 2 Ch. 277. If a testator forgives "the debts owing to him," such forgiveness will not extend to his "investments" in stocks, mortgages etc. *Re Neville*: *Neville v. First Garden City Ltd.* (1926) 1 Ch., 44. A legacy of stock in round numbers is not specific, *Wilson v. Brown Smith*, 9 Ves. 180: *Re Wilcock*, (1921) 2 Ch. 327; *Simmons Vallance*, 4 Bro. C.O. 345; legacies of money in general terms are not specific, but when bequeathed with reference to a particular fund they may be specific, *Hinton v.*

* In order to complete the title of a specific legatee to the legacy, the thing bequeathed must, at the testator's death, remain in species described in the will, otherwise it will be considered as revoked by ademption, *Williams on Executors*, 10th Ed. 1061.

Pink, 1 P. Wms. 540; *Lawson v. Stich*, 1 Atk., 508; *Suleman v. Dorab Ali*, 8 Cal., 1; *vide also sec. 148, infra*; a direction for payment out of money in bank does not make it specific. *Madhov Rao v. Administrator-General of Madras*, 1941 M.W.N. 773—(1941) 2 M.L.J. 677 = A.I.R. 1942 Mad. 17 = 201 I.C. 148; for other cases, *vide Pratt v. Pratt*, (1894) 1 Ch., 491; *Jones v. Palmer*, (1895) 2 Ch. 657; *Treepoorasoondery v. Debendro*, 2 Cal. 45; *Bai Bhikaji v. Bai Dina Bai*, 18 Bom. L.R. 319; *Webster v. Hale*, 8 Ves., 410. A gift of the whole of the testator's estate may be specific. *Powell v. Riley*, 12 Eq. 175; *Roffey v. Earley*, 42 L.J. Ch 472. A bequest may be specific although the testator says that it should not be so. *Jacques v. Chambers*, 2 Coll., 485. *Vide* notes under secs. 143 to 146, according to which legacies of certain description are not specific. Different portions of the rent of a particular house given to different persons will be an instance of a specific legacy as illustrated in Example (iv) of this section. *Raghurathi Bai v. Advocate-General of Bombay*, 59 Bom. L.R. 497 = A.I.R. 1937 Bom. 384 = 171 I.C. 341.

Election:—Where several properties answer the description of a specific bequest, the legatee has the option to make an election. Thus where the testator had 2 kanis of land but bequeathed only one kani, the legatee could select his one kani out of 2 kanis. *Narayansami v. Persathambi*, 18 Mad. 460. Similarly, where the testator has three houses in Kyd Street, but he bequeaths only two houses in that street, the legatee can make an election. *Tapley v. Eagleton*, L.R. 12 Ch. D. 688.

Test of Specific Legacy:—*Vide supra* at p. 294, ante.

Rule of Construction and Evidence as to the Legacy being Specific or General:—The Court generally leans against a construction that the legacy is specific. *Williams v. Hughes*, 24 Beav. 474; *Ellis v. Walker* Ambl. 310. Of course, the position will be different where the testator manifests a clear intention to make a specific bequest; in such a case the Court has no principle of its own to follow but to give literal effect to the intentions of the testator, *Innes v. Johnson*, 4 Ves., 568. But in absence of a clue as to the intention of the testator, the Court firmly adheres to the aforesaid rule of construction, and regards the legacy as general.

143. [Suc. S. 130] Where a certain sum is bequeathed, the legacy is not specific merely because the Bequest of certain sum where stocks, etc., in which invested are described. stock, funds or securities in which it is invested are described in the will.

Illustration.

A bequeaths to B—

"10,000 rupees of my funded property":

"10,000 rupees of my property now invested in shares of the East India Railway Company".

"10,000 rupees, at present secured by mortgage of Rampur factory".
No one of these legacies is specific.

N. B.—This section applies to Hindus &c. It says that the mere fact that the stock in which the bequeathed fund is invested is mentioned in the will does not render the legacy specific. Thus, a legacy of Rs. 10,000 invested in shares of the E. I. Ry. Company is not necessarily specific. *Vide* notes under the last section. When stress is laid on the amount, and the name of the stock is merely descriptive or demonstrative and is of secondary importance, being pointed out as the fund for the legacy, it is not specific. But on the other hand, if the name of the stock is of primary importance, and the amount is mentioned as a measure of the stock, the legacy is specific. Cf. *Hinton v. Pink*, 1 P. Wms. 540; *Robinson v. Addison*, 2 Beav., 515; *Lawson v. Stinch*, 1 Atk., 608; *Jefferys v. Jefferys*, 3 Atk., 120. Whether a legacy is intended to be specific or not, can be gathered from the language of the will; compare *Mitter v. Little* 2 Bro. C.C. 135; *Ashburner v. McGuire*, 2 Bro. C.C. 108; *Ashton v. Ashton*, 3 P. Wms. 311.

144. [Suc. S. 131] Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.

Illustration.

A bequeaths to B 5,000 rupees five per cent. Government securities. A had at the date of the will five per cent. Government securities for 5,000 rupees. The legacy is not specific.

N. B.—This section applies to Hindus etc.

Bequest of amount of stock not necessarily Specific:—The bequest in general terms of an amount of a stock is not necessarily specific simply because the testator possessed an equal or greater amount (than the amount of the legacy) of stock of the specified kind. *Vide* the illustration, which is a case of an equal amount. This illustration seems to be inconsistent with the English decisions, *vide Jefferys v. Jefferys*, 3 Atk. 120; *Page v. Young*, L.R. 19 Eq. 601; *Purse v. Snaplin*, 1 Atk. 418; *Webster v. Hale*, 8 Ves., 410; *Hinton v. Pink*, 1 P. Wms. 588. The reason of the rule is that the testator in such a case is not presumed to have bequeathed the specified commodity, but he is taken to have desired the

executor to purchase (out of his general assets) the fixed amount of the stock in question, *Partridge v. Partridge*, Cas. Temp. Talbot. 226. *Vide* the notes under the preceding section.

Intention of the Testator:—In cases contemplated by this section and the last one, the Court should ascertain from the will what was intended, that is, it should see whether the testator's intention was to bequeath the identical commodity or to purchase for the legatee the fixed or the specified stock, out of his general estate, *Partridge's case, supra*; see also *Ellis v. Walker*, Ambi 310.

145. [Suc. S. 132] A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place.
Bequest of money where not payable until part of testator's property disposed of in certain way.

Illustration.

A bequeaths to B 10,000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realised in England. The legacy is not specific. [See *Sadler v. Turner*, 8 Ves. 617].

N. B.—This section applies to Hindus etc.

The Principle:—A money legacy will not be rendered specific by its payment being postponed until a particular investment of fund takes place; *vide* the illustration; also *Sadler v. Turner*, 8 Ves. 617. For this reason, where a testator having properties in India and in England, respectively bequeaths them to respective residents of those places, it was held that the direction to pay out of the respective effects was only a direction as to payment, and not to make them specific, *vide Roberts v. Pocock*, 4 Ves. 158 citing *Kirkpatrick's case*.

146. [Suc. S. 133] Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

N. B.—This section applies to Hindus etc.

Articles enumerated in a bequest of Residue:—A general residuary clause does not cease to be general simply because it contains an enumeration of some

articles of properties comprised in the residue, *Pickup v. Alkinson*, 4 Hare, 628. Therefore, a mere enumeration of specific articles in a gift of residue will not make the gift of those articles specific, *Taylor v. Taylor*, 6 Sim. 246; *Fairer v. Park*, 8 Ch. D. 809; *Goud-enough v. Tremanodo*, 2 Beav., 512; *Baldock v. Green*, 40 Ch. D. 610. But where such articles are not comprised in the residue, but are separately enumerated and distinguished by such words as "also," "as well as" "together with," the principle of this section will not apply, and legacies will be specific, see *Fitz William v. Kelly*, 10 Hare 266 (274); *Bethune v. Kennedy*, 1 My. & Cr. 114. If the enumerated articles on the other hand are included in the residue, this section will apply, *Macdonald v. Irvine*, 8 Ch. D., 101. As to the meaning of the word "article" in this section, see *Julia Margaret v. Severina Sobina*, 20 L.W. 748 = A.C.R. 1925 Mad. 418 = 84 I.C. 1029. The word does not cover items of immoveable property, *Ibid.*

147. [Suc. S. 134] Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.
Retention, in form, of specific bequest to several persons in succession.

Illustrations.

(i) A, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C. B is to enjoy the property as A left it, although, if B lives for fifteen years, C can take nothing under the bequest.

(ii) A, having an annuity during the life of B, bequeaths it to C, for his life, and, after C's death, to D. C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest.

N. B.—This section applies to Hindus etc.

The Section :—"It is clear that if a person give certain property specifically to one person for life with remainder over afterwards, then although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook", *Pickering v. Pickering*, 4 My. & Cr. 289; also *Thursby v. Thursby*, L.R. 19 Eq. 895 and the cases cited therein; also the illustrations. For instances of perishable objects, *Randall v. Russell*, 3 Mer., 196; *Phillips v. Beat*, 82 Beav., 26.

148. [Suc. S. 135] Where property comprised in a bequest

Sale and investment of
proceeds of property
bequeathed to two or
more persons in suc-
cession.

to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Illustration.

A having a lease for a term of years, bequeaths all his property to B for life, and, after B's death, to C. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C. [See *Howe v. Dartmouth*, 7 Ves., 137].

N. B.—This section is applicable to Hindus etc.

The Section :—It provides for sale and investment of property not specifically bequeathed to two or more persons in succession. If the thing is specifically bequeathed it should be kept intact even though such a course might subject a remoter legatee to the risk of completely losing the legacy. *vide sec. 147, supra.* Under this section, the thing not being specifically bequeathed, should be sold and the proceeds of sale invested for the benefit of all the successive legatees. See *Howe v. Dartmouth*, 7 Ves., 137; *Morgan v. Morgan*, 14 Beav. 72 (28). Conversion under this section is not allowable unless the bequest is specific. *Holgate v. Jennings*, 24 Beav., 623; *Macdonald v. Irvine*, 8 Ch. D., 102.

Rules of Investment :—No rules seem to have been framed under this section by any of the High Courts for investments of sale proceeds; but rules relating to investments under sec. 20 of the Indian Trusts Act (II of 1882) and the Administrator-General's Act (III of 1913) may be taken as a guide.

Limitation to this Rule : Direction to the Contrary :—The section is subject to this limitation, that it will not apply where the testator gives a *contrary* direction prohibiting such conversion, *Morgan v. Morgan*, *supra*; *Thursby v. Thursby*, L. R. 19 Eq. 395; *Re Chancellor*, 26 Ch. D., 42; *Wearing v. Wearing*, 28 Beav., 99; so, where the testator directs enjoyment of the legacy in its existing condition, no conversion is permissible, *Pickering v. Pickering*, 4 N.Y. & Cr. 304; the direction against conversion must be express, *Muston v. Mackay*, 18 Beav., 196.

149. [Suc. S. 136] If there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.
 Where deficiency of assets to pay legacies, a specific legacy not to abate with general legacies.

N.B.—The section applies to Hindus etc.

No abatement of Specific Legacy for Insufficient Assets:—Here we have an instance of the advantage of a specific legacy. Even if the testator's assets prove deficient, such a legacy is not liable to abate with the general legacies; *Vaughan v. Smith*, (1914) 2 Ch. 119; *Hinton v. Pinke*, 1 P. Wms. 540. There is no escape from abatement if the legacy is not specific, *Armstrong v. Gamble*, 1908 1 Ir. R. 274. Consult *Ex parte Thompson*, (1902) 86 L.T. 25. Cf. sec. 328, *infra*.

N.B.—For the application of the section to the Hindus in the Punjab, *vide Bhagwan Das v. Ram Das*, 16 P.L.R. 1909 : 109 P.B. 1908 : 4 I.C. 909.

CHAPTER XV.

OF DEMONSTRATIVE LEGACIES.

150. [Suc. S. 137] Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that—

where specified property is given to the legatee, the legacy is specific;

where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations.

- (i) A bequeathes to B 1,000 rupees, being part of debt due to him from W. He also bequeathes to C 1,000 rupees to be paid out of the debt due to him from W.

The legacy to B is specific, the legacy to C is demonstrative. [See *Ford v. Fleming*, 2 P. Wms. 269].

(ii) A bequeaths to B—

"ten bushels of the corn which shall grow in my field of Green Acre":
 "80 chests of the indigo which shall be made at my factory of Rampur":
 "10,000 rupees out of my five per cent. promissory notes of the Central Government":
 "an annuity of 500 rupees "from my funded property";
 "1,000 rupees out of the sum of 2,000 rupees due to me by C":
 as annuity, and directs it to be paid "out of the rents arising from my taluk of Ramnagar." [*Kirby v. Patter*, 4 Ves., 748].

(iii) A bequeaths to B—

"10,000 rupees out of my estate at Ramnagar," or charges it on his estate at Ramnagar:
 "10,000 rupees, being my share of the capital embarked in a certain business."

Each of these bequests is demonstrative.

N. B.—This section applies to Hindus etc.

Demonstrative Legacy:—Ordinarily, a legacy payable out of a particular fund or stock, is demonstrative, *Saville v. Bluchet*, 1 P. Wms. 777; *Sparrow v. Josselyn*, 16 Beav. 135. It is a gift of money, intended for the legatee at all events with a fund particularly referred to for its payment; so that if the estate be not the testator's property at his death, the legacy will not fail, but be payable out of his general estate. *Vide Roper* (4th Ed.) 198. Cf. *Attwater v. Attwater*, 18 Bevan, 330; *Duncan v. Duncan*, 27 Beav. 390. A legacy payable "after a certain money has been received," is a demonstrative and not a specific one, *Rajanskant v. Eko Ratilal*, 30 Bom. L.R. 1124 = A.I.R. 1932 Bom 506 = 140 I. O. 206. A direction for payment out of the amount in Bank constitutes a demonstrative legacy, *Madhav Rao v. Administrator-General of Madras*. (1941) 2 M.L.J. 677 = 1941 M.W.N. 773 = A.I.R. 1942 Mad. 17 = 201 I.O. 143. Being a legacy of quantity the demonstrative legacy partakes of the nature of a general legacy. Again it being referable to a particular fund for payment it approaches a specific legacy. So in one sense it is general and in another sense it is a specific legacy. *Smith v. Fitz-Gerald*, 3 Ves. & B. 5. It does not fail when the fund out of which it is payable does not exist, being then payable out of the testator's general estate, nor does it abate with the general legacies upon deficiency of assets, *vide* notes and cases under the next paragraph. *Vide also Shahib Mirza v. Umda Khanum, infra*. A demonstrative legacy is however liable to abate when it becomes a general legacy by reason of the failure of the fund upon which it draws, *Mullins v. Smith*, 1 Dr. & Sm., 210. A

direction to pay an annuity out of the income of certain property is held to be a demonstrative legacy, *Bhagwan v. Ramdas*, 109 P.R. 1908. Cf. Illustration (iii)

Explanation: Contrast between a Demonstrative and a Specific Legacy:—
This *Explanation* lays down the test for determining whether a bequest is specific or demonstrative, *Bhangirathibai v. Advocate-General of Bombay*, 89 Bom. L.R. 497 = A.I.R. 1937 Bom. 984 = 171 I.C. 841. A demonstrative legacy differs from a specific legacy in this that it does not, whereas the latter does, fail, when the particular fund out of which the legacy is payable ceases to be in existence at the time of the testator's death. The demonstrative legacy in such contingency is payable out of the general assets of the testator, *Vickers v. Pound*, 6 H.L. Ca. 885; *Gillaume v. Aderly*, 15 Ves., 384; *Chinnam v. Tadikanda*, 29 Mad., 166; *Shahib Mirza v. Umda Khanum*, 19 I.A. 83 = 19 Cal. 444; *Bhagwan v. Ramdas*, 109 P.R. 1908 = 16 P.L.R. 1909 = 4 I.C. 909, *Swarnalata Bose v. Premode Chandra Roy*, 63 C.W.N. 227 = A.I.R. 1959 Cal. 268. In one respect, a demonstrative legacy is very much like a specific legacy; quite like the latter, it is not liable to abate with general legacies upon a deficiency of assets, *King v. Martin*, 2 Ves. Jun. 840. When the bequeathed property yields an income, the specific legacy will carry the income from the testator's death, *Jacques v. Chambers*, 2 Coll. 436 (440); the demonstrative legacy does not do so, *Mullins v. Smith*, *supra*. Cf. *Papet v. Huish*, 1 Hem. & Mill. 669. The Indian law is also to the same effect, vide *Chinnam v. Tadikanda*, *supra*.

151. [Suc. S. 138] Where a portion of a fund is specifically

Order of payment
when legacy directed to
be paid out of fund the
subject of specific
legacy.
bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund and, so far as the residue shall be deficient, out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

N. B.—This section is applicable to Hindus etc.

Order of Payment of Legacies drawing upon Specific Funds:—The specific legacy on the fund should be paid; then out of the residue, the demonstrative

legacy has to be paid ; and if the residue is insufficient for the purpose, the demonstrative legacy will be paid out of the general assets of the testator. Vids the cases cited under the last section.

Direction to the Contrary :—The rule that in the case of a demonstrative legacy, the legatee can resort to the general assets on the failure of the specified fund, does not apply where there are directions to the contrary, *Chinnam v. Tadikanda*, 29 Mad., 156.

CHAPTER XVI.

OF ADEMPTION OF LEGACIES.

152. [Suc. S. 139] If anything which has been specifically Ademption explained. bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed ; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

Illustrations.

(i) A bequeaths to B—

"the diamond ring presented to me by C":

"my gold chain":

"a certain bale of wool":

"a certain piece of cloth":

"all my household goods which shall be in or about my dwelling house in M Street in Calcutta, at the time of my death."

in his life time,—

sells or gives away the ring :

converts the chain into a cup :

converts the wool into cloth :

makes the cloth into a garment :

takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(ii) A bequeaths to B—

"the sum of 1,000 rupees in a certain chest":

"all the horses in my stable."

At the death of A, no money is found in the chest, and no horses in the stable. The legacies are adeemed.

(iii) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned. The legacy is adeemed.

N. B.—This section is applicable to Hindus etc.

Ademption :—It means failure of a specific bequest owing to withdrawal of the thing bequeathed from the operation of the will, by reason of its non-existence or not being part of the testator's estate at the time of his death or by reason of its conversion into property of a different kind. *Humphreys v. Humphreys*, 2 Cox., 185. The specific legacy must remain specie as described in the will on the testator's death, otherwise it will not take effect, *Ashburner v. MacGuire*, 2 Bro. C.C. 108 (110); *Williams On Executors*, 10th Ed. p. 1061. For instances of ademption by conversion of the bequeathed thing into new property, see *Re Lane*, 14 Ch. D., 856. Vide also *Re Richard Jones*, (1921) 1 Ch. 613; *Steward v. Lonsdale*, 1921 W.N. (Eng.) 140; *Freer v. Freer*, 22 Ch. D. 622. For an instance of ademption resulting from the destruction of the property by *Vis Major* or accident, see *Durrant v. Friend*, 5 De G. & Sim., 349. Where the legacy is a debt due to the testator, it is adeemed if the testator receives it, vide notes under s. 154. Where the bequest is both of moveable and immoveable property, and the testator, in satisfaction of the mortgage decree he holds, accepts a mortgage bond, there will be no question of ademption under this section, *Santosh Kumar Bose v. Jalad Sashi Devi*, A.I.R. 1941 Pat. 18 = 190 I.C. 36.

Doctrine of Ademption :—The doctrine is based upon the theory that the testator has changed his mind; otherwise, he would have seen to the preservation of the property in specie as part of his estate. Cf. *Partridge v Partridge*, Cas. Temp. Talbot, 227 (cited at p. 298 ante). The doctrine applies to gifts made under power of appointment, *Re Dowsett*, (1901) 1 Ch. 398; *Re Moses*, (1902) 1 Ch. 100. Thus, under a power of appointment, the testator gives property Z to a legatee, but the property Z is subsequently converted into another property, the legacy is adeemed, *Gale v. Gale*, 21 Beav. 349. The doctrine does not apply to demonstrative legacies, sec. 153, post.

Distinction between Ademption and Revocation :—Ademption results by operation of law from withdrawal of the property from the operation of the will; but revocation is a voluntary testamentary act on the part of the testator. Cf. *Ashburner v. Mac-Guire*, supra.

153. [Suc. S. 140] A demonstrative legacy is not adeemed by reason that the property on which it is charged Non ademption of de- by the will does not exist at the time of the death monistrative legacy. of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator.

N.B.—This section applies to Hindus etc. For its application in the Punjab, see *Bhagwan Das v. Ram Das*, 16 P.L.R. 1909 : 109 P.R. 1908 : 4 I.C. 909.

Non-ademption of Demonstrative Legacy:—We have seen that the doctrine of ademption does not apply to Demonstrative Legacies, *vide* at p. 303, and *supra*; also *Gillaume v. Adderly*, 15 Ves., 384; *Sridevi Amma v. Venkalaparuvama*, I.L.R. (1959) Ker. 665 = A.I.R. 1960 Ker. 1 (R. B.). When the fund out of which a demonstrative legacy is payable ceases to exist or is converted into some other property, such legacy is not adeemed but will be paid out of the general assets of the testator. Cf. *Sahib Mirza v. Umda Khanum*, 19 I.A. 89 : 19 Cal 444; *Vickers v. Pound*, 6 H.L., 886.

154. [Suc. S. 141] Where the thing specifically bequeathed Ademption of specific is the right to receive something of value from bequest of right to a third party, and the testator himself receives it, receive something from the bequest is adeemed.

Illustrations.

(i) A bequeaths to B—

"the debt which C owes me":

"2,000 rupees which I have in the hands of D":

"the money due to me on the bond of E":

"my mortgage on the Rampur factory."

All these debts are extinguished in A's lifetime, some with and some without his consent. All the legacies are adeemed.

(ii) A bequeaths to B his interest in certain policies of life assurance. A in his lifetime receives the amount of the policies. The legacy is adeemed. [See *Barker v. Raynor*, 5 Mad. 208].

N.B.—This section applies to Hindus etc.

Ademption where the Specific Legacy is a Debt:—Where the legacy is a debt due to the testator, it is adeemed if the testator receives it, *Re Slater*,

(1907) 1 Ch. 665; *Rider v. Wager*, 2 P. Wms. 329 (380); *Manton v. Tabois*, 80 C.D. 92; *Harrison v. Jackson*, 7 C.D. 389. It makes no difference under this section whether the payment is voluntary or compulsory, *Ashburner v. MacGuire*, 2 Bro. C.C. 110 (113); *Badrick v. Stevens*, 3 Bro. C.C. 431. The section obviously includes dividends, monies due under a life-policy and so forth, *vide, Ibid.*; and *illus.* (2); also *Barker v. Raynor*, 5 Mad., 208 (affirmed on appeal 2 Kessel Chan. cases, 122). As to the effect of forgiving a debt, *vide Wedmore*, (1907) 2 Ch. 277; *Re Neville : Neville v. First Garden City Ltd.*, (1925) 1 Ch., 44.

155. [Suc. S. 142] The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.
Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed.

Illustration.

A bequeaths to B "the debt due to me by C." The debt amounts to 10,000 rupees. C pays to A 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A. [See *Fryer v. Morris*, 9 Ves., 360.]

N.B. — This section applies to Hindus etc.

Ademption pro tanto by part payment: — Where a part of the specific legacy is received by the testator himself, there will be ademption *pro tanto*, that is, to the extent of the amount so received; *vide* the illustration and the case thereagainst. Also see *Ashburner v. MacGuire*, 2 Bro. C.C. 108 (110); *Aston v. Wood*, 43 L.J. Ch. 715. Compare this section with the last section (n. 154), which treats of the right to receive something from a third party, whereas this section speaks of the thing itself.

156. [Suc. S. 143] If a portion of an entire fund or stock is specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.
Ademption *pro tanto* by testator's receipt of portion of entire fund of which portion has been specifically bequeathed.

Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000

rupees which are due from W to A at the time of his death belong to B under the specific bequest.

N. B.—This section applies to Hindus etc.

Ademption pro tanto by part payment of the Entire Fund specifically bequeathed:—The underlying principle of this section is the same as that of the last section. *Vide* the cases under that section and the illustration to this section. The principle of this section equally applies whether the gift be directly to the legatee or through the intervention of trustees, *Re Broadwood*, (1911) 1 Ch. 277.

157. [Suc. S. 144] Where a portion of a fund is specifically

Order of payment where portion of fund specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee,

then, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees part of the debt of 2,000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. A afterwards receives 5,000 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

The Section:—Where a *specific* legacy and a *demonstrative* legacy are payable out of the same fund, if a portion of the fund be received by the testator, the balance or residue should be first applied in payment of the specific legacy, and the surplus (if any) should go towards the payment of the demonstrative legacy, unsatisfied part thereof being realisable from the general assets of the testator. The section involves two principles (as we have seen before): (1) The Specific Legacy should be paid at all events. (2) The demonstrative legacy is referable in the first instance to available funds in the stock on which it draws, and failing that it should fall back on the general assets; *Vide Kermode v. McDonald*, L.R. 1 Eq. 459; *Attwater v. Attwater*, 18 Beav., 380; *Duncan v. Duncan*, 27 Beav. 890. Also compare secs. 150 and 151.

158. [Suc. S. 145] Where stock which has been specifically Ademption where stock, bequeathed does not exist at the testator's death, specifically bequeathed, does not exist at the legacy is adeemed. testator's death.

Illustration.

A bequeaths to B—

"my capital stock of 1,000/- in East India Stock":

"my promissory notes of the Central Government for 10,000 rupees in their 4 per cent. loan."

A sells the stock and the notes. The legacies are adeemed.

*N.B.—*This section is applicable to Hindus etc.

Ademption by non-existence of Object of Legacy:—A specific legacy is adeemed if the thing bequeathed does not exist at the testator's death. We have already seen that a specific legacy does not take effect, if the bequeathed thing does not remain specie at the testator's death. *Humphreys v. Humphreys*, 2 Cox. 185 (*vide* at p. 305 *ante*); and the rule of this section necessarily follows from that principle. For cases on this subject, see *Slater v. Slater*, (1907) 1 Ch. 665; *Re Herring*, (1908) 2 Ch. 493; *Freer v. Freer*, 22 Ch. D. 622.

159. [Suc. S. 146] Where stock which has been specifically Ademption *pro tanto* bequeathed exists only in part at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to B his 10,000 rupees in the 5½ per cent. loan of the Central Government. A sells one-half of his 10,000 rupees in the loan in question. One-half of the legacy is adeemed.

*N.B.—*This section applies to Hindus.

Ademption *pro tanto* by non-existence of Object of Legacy:—This section differs from the preceding one only in this that it contemplates only *partial* non-existence of the bequeathed thing; but the underlying principle is the same. *Vide* the cases under secs. 152 and 158, *supra*.

160. [Suc. S. 147] A specific bequest of goods under a description connecting them with a certain place is not adempted by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Illustrations.

(i) A bequeathes to B "all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death." The goods are removed from the house to save them from fire. A dies before they are brought back.

(ii) A bequeathes to B "all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death". During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legacies is adempted.

N B—This section is applicable to Hindus etc.

Ademption by Removal :—As to whether removal of the bequeathed thing from its place works as ademption, the real test will be whether the place is a primary consideration with reference to the legacy or it is merely descriptive, *Blagrave v. Coare*, 27 Beav. 138. Thus, where the furniture, household goods etc. of a house derive their importance from the fact of their being in the house, and their enjoyment is very intimately connected with the enjoyment of the house, their removal from the house will work as ademption, *Heseltine v. Heseltine*, 3 Madd., 276; *Spencer v. Spencer*, 21 Beav., 548. But this section provides an exception to the Rule of ademption by removal, and says, that when such removal is due to temporary causes, or is the result of fraud or is without the knowledge or sanction of the testator, it will not be followed by ademption, vide *Norris v. Norris*, 2 Coll., 719; *Cockerell v. Earl of Essex*, 26 Ch. D. 598; *Domville v. Baker*, 32 Beav., 604; *Shaftesbury v. Shaftesbury*, 2 Vern., 747. Cf. *Laud v. Devaynes*, 4 Bro. C.C. 587.

161. [Suc. S. 148] The removal of the thing bequeathed from the place in which it is stated in the will when removal of thing bequeathed does not constitute an ademption, to be situated does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

(i) A bequeathes to B "all the bills, bonds and other securities for money belonging to me now lying in my lodgings in Calcutta." At the time of his death, these effects had been removed from his lodgings in Calcutta.

(ii) A bequeathes to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

(iii) A bequeathes to B all his goods on board a certain ship then lying in the river Hugli. The goods are removed by A's directions to a warehouse, in which they remain at the time of A's death.

No one of these legacies is revoked by ademption.

N. B.—This section applies to Hindus etc.

No Ademption by Removal, when the mention of the place is only descriptive:—
Vide the notes and the cases under the last section. Also see *Le Grice v. Fitch*, 3 Mer. 50.

162. [Suc. S. 149]. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeathes to B whatever sum may be received from his claim on C. A receives the whole of his claim on C, and sets it apart from the general mass of his property. The legacy is not adeemed.

N. B.—This section applies to Hindus etc.

The Principle of this Section:—In order to follow the principle of this section it should be compared with sec. 154, *supra*. That section contemplates the bequest

of a debt *qua* debt. But this section contemplates only money or other commodity receivable from another, where the testator receives such money or the commodity, and sets it apart, there will be no ademption; but on the other hand if he mixes it up with the general mass of his property, the legacy will be adeemed. *Vids Clarke v. Browne*, 2 Sm. & G., 524. This case has been subsequently disapproved in England, see *Harrison v. Jackson*, 7 Ch. D. 339; but such modification of the law in England will not affect the Indian law which is statutory. For the rule in this section, also see *Moore v. Moore*, 29 Beav., 496.

163. [Suc. S. 150] Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Change by operation of law of subject of specific bequest between date of will and testator's death.

Illustrations.

(i) A bequeaths to B "all the money which I have in the 5½ per cent. loan of the Central Government". The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock.

(ii) A bequeaths to B the sum of 2,000*l*, invested in Consols in the names of trustees for A. The sum of 2,000*l* is transferred by the trustees into A's own name. [See *Lee v. Lee*, 27 L.J., Ch. 824; *Dingwell v. Askew*, 1 Cox, 427].

(iii) A bequeaths to B the sum of 10,000 rupees in promissory notes of the Central Government which he has power under his marriage settlement to dispose of by will. Afterwards, in A's lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

N. B.—This section is applicable to Hindus etc.

The Principle of this Section :—Ademption from change of the subject matter of bequest arises from the theory that the change in the form of the legacy is an indication that the testator has altered his mind. But when such change is due to operation of law, there is no room for the application of the theory of a supposed alteration of the testator's intention. Hence the rule in this section. Instances of change of the form of legacy by operation of law will be found in the following cases: *Partridge v. Partridge*, Cas. Tem. Talbot,

227 (which says that there is no ademption when the bequeathed stock is changed by Act of Parliament); *Oakes v. Oakes*, 9 Hare, 666; *Shaftesbury v. Shaftesbury*, 2 Vern., 747; *Re Clifford Mallan*, (1912) 1 Ch. 29 (which says that subdivision of shares works no ademption); *Re Leeming*, (1912) 1 Ch. 826 (a case in which an old joint stock company was reconstituted and it was held that there was no ademption by such reconstitution).

164. [Suc. S. 151] Where a thing specifically bequeathed undergoes a change between the date of the will without testator's knowledge and the testator's death and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Illustration.

A bequeaths to B "all my 9 per cent. Consols". The Consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

*N. B.—*This section is applicable to Hindus etc.

No Ademption by reason of change of Subject-matter of legacy without the testator's knowledge or Sanction:—See *Jones v. Green*, 5 Eq. 666; *Larking v. Larking*, 37 Ch. D. 810; *Damville v. Taylor*, 22 Beav. 604; "A mere unexecuted intention to change the state of a fund, which the testator might have revoked, and which, in fact, was never carried into execution, cannot in any sense, be considered as an ademption," *Bason v. Brandon*, 8 Sim., 171.

165. [Suc. S. 152] Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed.

*N. B.—*This section is applicable to Hindus etc. It says that there is no ademption where the subject of specific legacy is lent out to another person on condition of being replaced, the underlying principle being that there is no such change in the legacy as to imply an alteration of the testator's mind. Cf. *Partridge v. Partridge*, cited at p. 312, *supra*.

166. [Suc. S. 153] Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

N.B.—This section is applicable to the Hindus etc. Under it, there is no ademption if the specific legacy is sold and afterwards replaced by an equal quantity of the same stock. Cf. *Partridge's case supra*. Cf. *Mathews v. Foulsham*, I.R. 2 Eq. 669; *Macdonald v. Irvine*, 8 Ch. D. 101; *Montague v. Montague*, 16 Beav. 565; Cf. *Alford v. Earle*, 2 Veru., 209; *Abney v. Miller*, 2 Atk. 699. The section will not apply unless there is an equal quantity of the newly purchased stock, Cf. *Pattison v. Pattison*, 1 My. & K. 12.

CHAPTER XVII.

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST.

167. [Soc. S. 154] (1) Where property specifically bequeathed is subject at the death of the testator to

Non-liability of exec-
utor to exonerate
specific legatee.

any pledge, lien or incumbrance created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(i) A bequeaths to B the diamond ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.

(ii) A bequeaths to B a zamindari which at A's death is subject to a mortgage for 10,000 rupees: and the whole of the principal sum, together with interest to

the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to his charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

N.B.—This section is applicable to the Hindus etc. It is based on the Real Estate Charges Act, 1854 (17 & 18 Vic. C. 118), commonly known as Locke King's Act.

The Legatee takes specific Bequest subject to Incumbrance:—Where a property, subject to a lien or an incumbrance is *specifically*, bequeathed, the legatee takes the legacy subject to such incumbrance, etc. It is not incumbent on the executor to redeem such incumbrances etc. out of the general assets of the testator, and to exonerate the legacy. Cf. *Nelson v. Page*, L.R. 7 Eq. 25 (28).

English Law:—Under the English law, the Lock King's Act applies only to real property and not to the personal estate of the testator; therefore, under that law an executor is liable to redeem a specific legacy of personal property out of the general assets or the estate of the testator, Cf. *Ashburner v. McQuire*, 2 Bro. C.C. 111; *Knight v. Davis*, 3 My. & K. 858; *Re Boller*, (1894) 3 Ch. 280. But this section does not recognise any such distinction between realty and personality and applies equally to both immoveable and moveable property.

Pledge, Lien, Incumbrance:—In an old English case it was held that a lien for unpaid purchase money was not such a charge as would involve the question of redemption by the executor; vide *Hood v. Hood*, 26 L.J. Ch. 616. But this section specifically mentions the word "lien," and thereby avoids the controversy as to whether a lien for unpaid purchase money would fall within the meaning of an incumbrance. But vide the next section. A will devising immoveable property stated that the father of the legatee had given a loan to the testator and directed the legatee to repay the same with interest and this was held to constitute a charge on the legacy. *Girish Chunder v. Anundmaya*, 14 I.A. 187: 15 Cal. 66 (P.C.). For unpaid calls on shares, see *Adams v. Ferick*, 26 Beav. 384; *Armstrong v. Burrient*, 20 Beav., 424.

Contrary intention in the Will:—The principle of this section will not apply where the will shows that the testator intended otherwise; for instance, if there be a direction upon the executor to free the specific legacy from incumbrance before payment, the burden of such incumbrance falls not on the legatee but upon the general assets of the testator, vide *Stone v. Parker*, 1 Dr. & Sm. 222; *Re Campbell* (1898) 2 Ch. 206; *Allen v. Allen*, 30 Beav., 895; *Mellish v. Vallins*, 2 John & H. 194; *Rodhouse v. Mold*, 35 L.J. Ch. 67. A general direction in a will for payment of the testator's debts is not sufficient to justify an inference of any such contrary intention, vide sub-sec. (2); also *Pembroke v. Friend*, 1 John & Hem. 182; so, no

such contrary intention is to be inferred where the direction in the will is to pay the testator's debts *generally* and not any particular lien or incumbrance on the specific legacy, *Woolstenholme v. Woolstenholme*, 2 DeG. F. & J. 847; *Rowson v. Harrison*, 31 Beav. 207. Where a part of the mortgaged property is specifically devised and the other part remains with the residue of the testator's estate, that is no indication of a contrary intention, Cf. *Sackville v. Smith*, L.R. 17 Eq. 168; *Re Smith*, 33 Ch. D. 196; *Gibbons v. Eyden*, L.R. 7 Eq. 371; but the specific legatee must contribute rateably, *Re Neumarch*, L.R. 9 Ch. D. 12.

Exception:—Land revenue or rent is not within the meaning of an incumbrance as used in this section. For English cases on this point, see *Coles v. Courtur*, 34 Ch. D. 136; *Thompson v. Riddings*, (1897) 1 Oh. 876; *Tomlinson v. Tomlinson*, (1898) 2 Ch. 232. Compare sec. 169, *post*.

168. [Suc. S. 155] Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Completion of testator's title to things bequeathed to be at cost of his estate.

Illustrations.

(i) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths to B, and dies before he has paid the purchase-money. The purchase-money must be made good out of A's assets.

(ii) A, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

N. B.—This section applies to Hinds etc.

Testator's Title to the thing bequeathed should be completed at the cost of his Estate:—When anything has to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of his estate. *Vide* the illustrations. Thus, if the purchase money remains unpaid and if payment of such purchase money is necessary to complete the testator's title to the property, the legatee can compel the executor to pay down the amount, *Broome v. Monck*, 10 Ves., 597 (616); *Milner v. Mills*, Moseley, 123; *Whittaker v. Whittaker*, 4 Bro. C.C. 30. This section applies only if the title in question is capable of being completed. So, where the contract for purchase cannot be completed for some reason or other, and the executor is compelled to take refund of the portion of the purchase money

already paid down, the legatee cannot claim the amount of such refund, *Green v. Smith*, 1 Atk. 572, the reason being that nobody knows how the testator himself would have disposed of the amount of such refund. Cf. *Curre v. Bowyer*, 5 Beav., 6 (note). The principle of this section will apply to calls in arrears in respect of shares in joint stock companies at the testator's death, see *Day v. Day*, 1 Dr. & Sm. 261; *vide also* sec. 170, *post*.

Unpaid purchase money in case of Specific Legacies:—Under sec. 54 of the T.P. Act, a sale may be complete even when the price is part-paid and part-promised, *Nitai Chandra v. Srimati Champaklata*, 29 C.L.J. 250; *Gosho Behari v. Rohini*, 18 C.W.N. 692; *Kashidas v. Chaithru*, 19 C.L.J. 239; *Kamini Kumar v. Dunga Charan*, 37 C.L.J. 122. Whether a sale is complete or not is a question of intention between the parties, *vide Ibid*. When the sale is complete, the unpaid portion of the purchase money only creates a lien in favour of the vendor, and such lien will fall on the shoulder of the legatee (under sec. 167), if the property agreed to be purchased is specifically bequeathed. But where the contract for sale stipulates that the sale will not be complete until the whole purchase money is paid (*vide Nitai Chandra's and Kashidas's cases, supra*), the unpaid portion of the purchase money has to be paid out of the testator's estate as such payment is a condition precedent to the completion of the testator's title within the meaning of this section.

169. [Suc. S. 156] Where there is a bequest of any interest in immoveable property in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, up to the day of his death.

Illustration.

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate will make good 25 rupees in respect of the rent.

N. B.—This section is applicable to Hindus etc.

Apportionment of Rent etc:—Rent, land-revenue etc., payable in respect of the bequeathed estate, up to the testator's death, should be paid out of the estate, and those accruing due after the testator's death should be paid by the legatee. Cf. *Re Fitz Williams Kelly*, 10 Hare, 266. Cf. *MacLaren v. Stainton*, 3 Deg. F. & J.

202 and sec. 2 of the English Apportionment Act (38 and 34 Vic. C. 86). For analogous principle in India, *vide Satyendranath v. Nilkanta*, 21 Cal., 883.

170. [Suc. S. 157] In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of the stock, such call or payment shall, as between the testator's estate and the legatee, be borne by the estate ; but, if any call or other payment becomes due in respect of such stock after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest.

Exoneration of specific legatee's stock in joint stock company.

Illustrations.

(i) A bequeaths to B his shares in a certain railway. At A's death there was due from him the sum of 100 rupees in respect of each share, being the amount of a call which had been duly made, and the sum of five rupees in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate. [See *Day v. Day*, 1 Dr. & Sim. 261].

(ii) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 100 rupees in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title. [See *Armstrong v. Burnet*, 20 Bom., 424].

(iii) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call. [See *Adams v. Ferick*, 26 Beav., 384].

(iv) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(v) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of fifty rupees per share, payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

N. B.—This section is applicable to Hindus etc.

Specific Bequest of Shares:—Where shares in a joint stock company are specifically bequeathed, unpaid calls, accruing due before the testator's death should be paid out of his estate, (on the principle laid down in sec. 168, *supra*) ; and those falling due after the testator's death should be borne by the legatee if he accepts the bequest; *vide* the illustrations and the cases cited thereagainst.

Essential Requisites of the Section:—The shares should be *specifically* bequeathed, (ii) there should be no contrary direction in the will precluding the application of the section, (iii) The liability of the legatee (under this section) arises only if he accepts the bequest; see *Mafelt v. Bates*, 3 Sm. & G. 468.

CHAPTER XVIII.

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

171. [Suc. S. 158] If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Illustrations.

(i) A bequeaths to B a pair of carriage-horses or a diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(ii) A bequeaths to B "my pair of carriage-horses." A had no carriage-horses at the time of his death. The legacy fails. [*Bronsdon v. Winter, Amb.*, 67.]

N. B.—This section is applicable to Hindus etc.

Bequest in General Terms:—If a *thing* is bequeathed in general terms, and the testator has no such thing at the time of his death, the executor is bound to purchase such thing for the legatee if the funds in his hand permit it. *Vide* the illustration and the case thereagainst. To attract the application of the section, the bequest must be in general terms, e.g. a horse, a farm, a diamond ring or so forth. Cf. *Evans v. Tripp*, 6 Mad., 92. The bequest of a sum of stock in pounds and its fractions, being the exact amount of the stock that the testator possesses at the date of his will is a general legacy unless there is something else on the face of the will to indicate that the testator intended it to be specific. Cf. sec. 144, *supra*; *Warwick v. Wilcock*, (1921) 2 Ch. 827.

CHAPTER XIX.

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

172. [Suc. S. 159] Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interest, shall belong to the legatee.

Bequest of interest or produce of fund.

Illustrations.

(i) A bequeaths to B the interest of his 5 per cent. promissory notes of the Central Government. There is no other clause in the will affecting those securities. B is entitled to A's 5 per cent. promissory notes of the Central Government.

(ii) A bequeaths the interest of his 5½ per cent. promissory notes of the Central Government to B for his life, and after his death to C. B is entitled to the interest of the notes during his life, and C is entitled to the notes upon B's death. [See *Gravener v. Watkins*, L.R. 6 C.P. 500].

(iii) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

N.B.—This section applies to Hindus etc. The principle of this section is similar to that of sec. 28 of the English Wills Act (I Vic C. 26) under which a devise of rents and profits carries an absolute estate. Cf. *Mannox v. Greener*, L.R. 14 Eq. 456; *Shookmoy v. Monohari*, 7 Cal. 269 (on appeal, 12 I.A. 108 : 11 Cal. 694), in which it was held that a gift of a share of rents and profits was equivalent to a gift of a share in the corpus.

Bequest of Interest or Produce:—Under this section, a gift of interest or produce of a fund is equivalent to a gift of both the principal and the interest of such fund, if there be no limitation to the duration of enjoyment, *Elton v. Shephard*, 1 Bro. C.C. 593. A gift of the produce of a fund implies a gift of such produce *in perpetuity*, and consequently a gift of the fund *itself*, *Mandakins v. Arunbala*, 3 C.L.J. 516. A gift of produce of a fund will imply a gift of its corpus only if there be "no limitation as to its continuance," *vide notes and cases under the heading, "Intention that enjoyment should be of limited duration"* *infra*; also *Kerr v. Middlesex Hospital*, 2 DeG. M. & G. 576; *Bent v. Cullen*, L.R. 6 Ch. 285; *Gowumi v. Mudhowdas*, 17 Bom. 600. A gift of produce and interest without any provision for the remainder, implies a gift of both corpus and income, *Vishram v. Gangaram*, A.I.R. 1895 Sind. 285 = 160 I.C. 694.

Produce of immoveable property :—Though this section speaks only of the interest or the produce of a fund, it also applies to immoveable property, *vide* illus. (iii); also *Hemangini Dasi v. Nobin Chandra*, 8 Cal. 788: 11 C.L.R. 870; *Mandakini v. Arunbala*, 9 C.L.J. 515 (519). Such is the law also in England (1 Vic. C. 26, sec. 28), where it has been held that a devise of the rents and profits of land is equivalent to devise of the land itself, *Mannox v. Greene*, *supra*; *Shookmoy's case*, *supra*. So, it has been held that a gift of income without more is a gift of the corpus though the gift is to the separate use or through the medium of trust, *Administrator-General v. Hughes*, 40 Cal., 192: 21 I.O. 188. *Vide* also *Ashutosh v. Doorga Charan*, 6 I.A. 182: 5 Cal., 438. *Sonataun Bysack v. Juggut Soondres*, 8 M.I.A. 66; *Akhil Chandra v. Rebati Rama*, 14 C.L.J. 618.

Intention that enjoyment should be of limited Duration :—The principle of this section will not apply if the will indicates an intention (of the testator) that the bequest should be enjoyed for a limited period, *Vullubdas v. Thucker Gordhandas*, 14 Bom., 360. A direction that the rents and profits of the bequeathed property are to be enjoyed by G, till G's son attains the age of 21, subject to an obligation to render accounts to such son when he attains the specified age, is an indication that the enjoyment of the bequest should be of limited duration, *Anandrao Vinayak v. Administrator-General*, 20 Bom. 450. Similarly, a direction restricting the power of alienation will be such an indication, *Siva Bau v. Vitta Bhatta*, 21 Mad. 425. For other circumstances indicating a similar intention see *Damodardas Tapidas v. Dayabhai*, 21 Bom., 1; *Karsandas v. Ladhavahu*, 12 Bom., 185; *Sarada Sundari v. Kisto Jiban*, 5 C.W.N. 300; as to what will be an indication of an unlimited period and consequently a gift of the corpus, see *Administrator-General v Money*, 15 Mad., 448 (467). A power of appointing the income of a fund for indefinite period takes the case out of this limitation and the principle of the section will apply. Cf. *L'Herminier*, (1894) 1 Ch., 675. As to what intention will be indicated by the use of words of inheritance in other parts of the will, see *Wisden v. Wisden*, 2 Sm. & Giff, 896. Cf. *Walkins v. Weston*, 32 Beav., 288; *Davidson v. Kimpton*, 18 Ch. D. 213; as to whether a bequest of income for "support" or "maintenance" will indicate an intention of limited enjoyment, see *Bhoobun Mohini v. Hurrish Chunder*, 5 I.A. 188: 4 Cal., 23; *Jogeswar v. Ram Chand*, 28 I.A. 97: 28 Cal., 670. A condition as to good character of the legatee does not indicate that enjoyment was to be of a limited duration, *Mannulal v. Lachman Das*, 1932 A.L.J. 564 = A.I.R. 1932 All. 476.

CHAPTER XX.
OF BEQUESTS OF ANNUITIES.

173. [Suc. S. 160] Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Illustrations.

(i) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(ii) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(iii) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

N.B.—This section applies to Hindus etc.

What is Annuity:—It ordinarily means a periodical payment of a sum of money made annually or at more frequent intervals for a certain length of time. Of course, an annuity may be given in perpetuity, *vide* under the heading "Perpetual Annuity," *infra*; Jerman, 6th Ed. p. 1185. Under the English law, it is looked upon as personal property, see *Earl of Stafford v. Buckley*, 2 Ves. Sen. 170; though when it is charged on land, it may be regarded as real property. Cf. *Rajat Kamini v. Satyaniranjan*, 28 C.W.N. 824—53 I.O. 687. But the present Judicial opinion about it is that it is simply a chose-in-action even though charged on immoveable property, *Satindra Nath v. Jatindranath*, 62 I.A. 265—39 C.W.N. 1191, P.O. In this country, the legal position of an annuity should be decided with reference to this section and not the English rules, *Madhusudhan Bagchi v. Hrishikesh Sanyal*, I. L. R. (1944) All. 209—1944 A.L.J. 129—A.J.R. 1944 All. 120—214 I. C. 66. An annuity created by will is a legacy; *vide Heath v. Weston*, 8 DeG. M. & G. 601; *Sibley v. Perry*, 7 Ves., 522. Although sec. 97 of the Act does not occur in this Chapter XX on the question of bequests of annuities, still the wordings of the section are wide enough to cover the cases of annuities and periodical payments, *Sath Sam v. Fela Hari*, 51 C.W.N. 340. Where a will provided for the payment of an annuity to the first annuitant and to his sons,

grandsons, and so on in due order of succession out of the rents and profits of certain properties ; held, there was a *perpetual annuity* which constituted a charge upon the property in question, *Sobha Kanta v. Kariman Halvai*, 60 I.C. 760 (Cal.), Cf. *Gunamoni v. Debiprosanna*, 28 C.W.N. 1088; *Jotindra Mohan v. Ghanashyam*, 38 C.L.J. 428. An allowance granted under a will may attach as a charge to the general estate, notwithstanding the fact that the testator himself is silent on the matter, *Upendra Nath v. Durlav Chandra*, A.I.R. 1941 Cal. 117=194 I.C. 188.

Annuity—if attachable and saleable An annuity is not *per se* a right to future maintenance within the meaning of sec. 6 (dd) of the T. P. Act and therefore may be attached and sold under sec. 60 of the C.P. Code.

Gopal Lal Seal v. F J. Marsden, 10 C.W.N. 1102; *Sundar Bibi v. Raj Indar*, 43 All. 617=A.I.R. 1921 All. 120=63 I.C. 181. See also *Raja of Ramnath v. Subramaniam Chettiar*, 52 Mad. 465=A.I.R. 1928 Mad. 1201=116 I.C. 827. An annuity may, however, under the terms of the devise, be for maintenance and then fall within the scope of sec 6 (dd) of the T. P. Act. [*Anirudha Mitra v. Official Receiver*, I.L.R. (1942) 1 Cal. 427=74 O.L.J. 528]. It may be pointed out that the case of *Rajat Kamini*, *supra* [28 C.W.N. 824] which makes right to maintenance charged on property an interest in property and alienable as such now stands superseded by sec. 6 (dd) of the T. P. Act. Read the notes in author's Transfer of Property Act under sec 6 (dd).

Annuity by will is ordinarily for life :—This section lays down that where an annuity is created by will, it is to be for life only unless a contrary intention is shown. *Vide* notes under the heading "Contrary intention", *infra*; also *Gopal Krishna v. Ramnath*, 5 Bom. L.R. 729. Therefore, it has been held that an annuity given *simpliciter* is for life only, *Yates v. Maden*, 5 Mac & G 532. Cf. *Potter v. Baker*, 18 Beav. 373; *Blewitt v. Roberts*, 1 Cr. & Ph. 274 (260). An annuity given for education or maintenance is necessarily for life, as being incapable of enduring beyond the lifetime of the annuitant, *Wilkins v. Jodrell*, L.R. 13 Ch. D. 564; *Re Ord.* 12 Ch. D. 22; compare *Narayani Dass v. Administrator-General*, 21 Cal. 683; *Yates v. Wyatt*, (1901) 2 Cb. 438. Under this section annuity will be for life even when it is directed to be paid out of the testator's property generally or of a particular property purchased for the purpose. Cf. *Banks v. Braithwaite*, 32 L.J. Ch. 86.

Perpetual Annuity :—Where the terms of the annuity are inconsistent with a mere life-interest it is perpetual, *Mansergh v. Campbell*, 3 DeG. & J. 283 (287); where there is clear indication in the will that the testator intended the annuity to be perpetual, the principle of this section will not apply. *Vide* notes under the last heading, as well as under the heading "Contrary Intention," *infra*. Such intention can be indicated in various ways, see *Panchu Gopal v. Kalidas*, 24 C.W.N. 692=54 I.C. 140. Where an annuity is given to a person *putra pustradi krama*, it may be said that a contrary intention has been expressed within the meaning of

CHAPTER XX.

OF BEQUESTS OF ANNUITIES.

173. [Suc. S. 160] Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Illustrations.

(i) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(ii) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(iii) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

N.B.—This section applies to Hindus etc.

What is Annuity:—It ordinarily means a periodical payment of a sum of money made annually or at more frequent intervals for a certain length of time. Of course, an annuity may be given in perpetuity, vide under the heading "Perpetual Annuity," *infra*; Jarman, 6th Ed. p. 1135. Under the English law, it is looked upon as personal property, see *Earl of Stafford v. Buckley*, 2 Ves. Sen. 170; though when it is charged on land, it may be regarded as real property. Cf. *Rajat Kamini v. Satyaniranjan*, 28 O.W.N. 824=53 I.C. 687. But the present Judicial opinion about it is that it is simply a chose-in-action even though charged on immoveable property, *Satindra Nath v. Jatindranath*, 62 I.A. 265=39 C.W.N. 1191, P.O. In this country, the legal position of an annuity should be decided with reference to this section and not the English rules, *Madhusudhan Bagchi v. Hrishikesh Sanyal*, I. L. R. (1944) All. 209=1944 A.L.J. 129=A.J.R. 1944 All. 120=214 I. C. 66. An annuity created by will is a legacy; vide *Heath v. Weston*, 3 DeG. M. & G. 601; *Sibley v. Perry*, 7 Ves., 522. Although sec. 97 of the Act does not occur in this Chapter XX on the question of bequests of annuities, still the wordings of the section are wide enough to cover the cases of annuities and periodical payments, *Sath Sam v. Fela Hari*, 51 O.W.N. 340. Where a will provided for the payment of an annuity to the first annuitant and to his sons,

grandsons, and so on in due order of succession out of the rents and profits of certain properties ; held, there was a perpetual annuity which constituted a charge upon the property in question, *Sobha Kanta v. Kariman Halvai*, 60 I.C. 750 (Cal.), Cf. *Gunamoni v. Debiprosanna*, 28 C.W.N. 1088 ; *Jotindra Mohan v. Ghanashyam*, 36 C.L.J. 428. An allowance granted under a will may attach as a charge to the general estate, notwithstanding the fact that the testator himself is silent on the matter, *Upendra Nath v. Durlav Chandra*, A.I.R. 1941 Cal. 117-194 I.C. 188.

An annuity is not *per se* a right to future maintenance
Annuity—if attachable within the meaning of sec. 6 (dd) of the T. P. Act and therefore and saleable, may be attached and sold under sec. 60 of the C.P. Code.

Gopal Lal Seal v. F J. Marsden, 10 C.W.N. 1102 ; *Sundar Bibi v. Raj Indar*, 49 All. 617 = A.I.R. 1921 All. 120 - 63 I.C. 181. See also *Raja of Ramnath v. Subramaniam Chettiar*, 52 Mad. 465 = A.I.R. 1928 Mad. 1201 = 116 I.C. 827. An annuity may, however, under the terms of the devise, be for maintenance and then fall within the scope of sec. 6 (dd) of the T. P. Act. [*Anirudha Mitra v. Official Receiver*, I.L.R. (1942) 1 Cal. 427 - 74 O.L.J. 628]. It may be pointed out that the case of *Rajat Kamini*, *supra* [28 C.W.N. 824] which makes right to maintenance charged on property an interest in property and alienable as such now stands superseded by sec. 6 (dd) of the T. P. Act. Read the notes in author's Transfer of Property Act under sec. 6 (dd).

Annuity by will is ordinarily for life :—This section lays down that where an annuity is created by will, it is to be for life only unless a contrary intention is shown. *Vide* notes under the heading "Contrary intention", *infra*; also *Gopal Krishna v. Ramnath*, 5 Bom. L.R. 729. Therefore, it has been held that an annuity given simpliciter is for life only, *Yates v. Maden*, 5 Mac & G 532. Cf. *Potter v. Baker*, 18 Beav. 373 ; *Blewitt v. Roberts*, 1 Cr. & Pb. 274 (260). An annuity given for education or maintenance is necessarily for life, as being incapable of enduring beyond the lifetime of the annuitant, *Wilkins v. Jodrell*, L.R. 13 Ch. D. 564 ; *Re Ord.* 12 Ch. D. 22 ; compare *Narayana Dass v. Administrator-General*, 21 Cal. 683 ; *Yates v. Wyatt*, (1901) 2 Ch. 438. Under this section annuity will be for life even when it is directed to be paid out of the testator's property generally or of a particular property purchased for the purpose. Cf. *Banks v. Braithwaite*, 32 L.J. Ch. 86.

Perpetual Annuity :—Where the terms of the annuity are inconsistent with a mere life-interest it is perpetual, *Mansergh v. Campbell*, 3 DeG. & J. 283 (287); where there is clear indication in the will that the testator intended the annuity to be perpetual, the principle of this section will not apply. *Vide* notes under the last heading, as well as under the heading "Contrary Intention," *infra*. Such intention can be indicated in various ways, see *Panchu Gopal v. Kalidas*, 24 C.W.N. 692 - 54 I.C. 140. Where an annuity is given to a person *putra poutradi krama*, it may be said that a contrary intention has been expressed within the meaning of

the section, *Saroda Prosad v. Debendranath*, 21 Pat. L.T. 87 = A.I.R. 1940 Pat. 287 = 186 I.C. 172; Cf. *Jagadish Chandra v. Rai Pade Dhal*, A.I.R. 1941; Pat. 458 = 196 I.C. 66. The use of the words *putra poustradi Kram*, does not imply a gift over to the sons and grandsons within the meaning of Illus (iv) of sec. 106, therefore, by the death of the annuitant within the testator's life-time, a question of lapsing under sec. 105 may possibly arise, see *Saroda Prosad v. Debendra Nath, supra*; (as cited at p. 210, ante).

Capitalisation of the value of Annuity:—See *Re Ruston*, 9 Cal. 796, vide under sec. 175, post.

Contrary intention:—The principle of this section does not apply when a *contrary intention* appears by the will, *Raj Lakhi v. Sarola Sundari*, 66 I.C. 808 (Cal.); thus, an annuity to sons, grandsons and so on in due order of succession was held to be a perpetual annuity, *Sobha Kanta v. Kariman*, 60 I.C. 760 (Cal.). Under the English law, where the corpus of a fund is set apart for payment of annuity out of the income thereof, that may be an indication that the annuity was intended to be perpetual, *Ibid.* Cf. also *Rawlings v. Jennings*, 18 Ves., 89; *Stretch v. Watkins*, 1 Madd., 258; *Panchugopal v. Kalidas*, 24 C.W.N. 692 = 54 I.C. 140. As to how far the segregation of a particular property will raise an inference of the perpetual character of the annuity under this section, in view of the last few words, viz., "notwithstanding that.....purchase of it," will be a question of considerable nicety. Of *Panchugopal's* case, *supra*, but even if such segregation renders the annuity perpetual, the property must be set apart for ever for payment of the annuity. The mere fact that the annuity is charged on the revenue of the property, will not give it a perpetual character, *Gopal Krishna v. Ramnath*, 6 Bom., L.R. 729. Cf. *Burden v. Geaghan*, L.R. 1 Eq. 246; *Sullivan v. Galbraith*, L.R. 4 Eq. 682. The perpetual character of the annuity can be inferred also from the fact that the operation of the annuity was extended beyond the life time of the first taker, Cf. *Potter v. Baker*, 18 Beav. 373; *Stokes v. Heron*, 12 Cl. & F. 161; *Mansergh v. Campbell*, 3 DeG. & J. 233; *Robinson v. Hunt*, 4 Beav., 450; *Hicks v. Ross*, L.R. 14 Eq. 141; *Gorden v. Meagher*, L.R. 1 Eq. 246. The section does not require that such contrary intention should be indicated by express words. It is sufficient if the contrary intention appears sufficiently from the language of the will read as a whole, *Niladrinath v. Sarojnath*, 62 I.C. 681 (Cal.). Vide also *Panchugopal v. Kalidas, supra*. But see *Lett v. Randall*, 2 DeG. F. & J. 392.

Suit for Annuity:—A suit for arrears of annuity assented to by the executor of the will is cognisable by the Presidency Small Cause Court. Such a suit is not one for enforcing a trust, *Dossibai v. Coorerbai*, 32 Bom., 575.

Amendment of the Section:—There is a verbal change in the section, the words "notwithstanding that" being substituted for the old words, "and this rule

shall not be varied by the circumstance that."

174. [Suo. S. 161] Where the will directs that an annuity

Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

Illustrations.

(i) A by his will directs that his executors shall, out of his property, purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity. [See *Palmer v. Crawford*, 8 Swanst, 417 (488)].

(ii) A bequeaths a fund to B for his life, and directs that after B's death, it shall be laid out in the purchase of an annuity for C. B and C survive the testator. C dies in B's lifetime. On B's death the fund belongs to the representative of C. [See *Bayley v. Bishop*, 9 Ves. 6; *Day v. Day*, 1 Drew, 569].

N. B — This section applies to Hindus etc.

Vesting of Interest in Annuity :—Where the will directs that an annuity shall be provided (a) out of the proceeds of property, or (b) out of property generally, or (c) that money bequeathed be invested in purchase of annuity, the legacy will vest in interest in the legatee on the testator's death. The effect of this rule is that where the amount of the legacy is directed to be invested in the purchase of an annuity and the legatee dies before it is so invested or even before the fund is available (e.g. when it is subject to a prior life interest), his representatives take his such vested interest, vide *Bayley v. Bishop*, supra : *Day v. Day*, supra and the illustrations. Cf. also *Kerr v. Middlesex Hospital*, 2 De M. & G. 584. *Re Robbins*, (1906) 2 Ch. 648 ; (1907) 2 Ch., 8 ; *Seth Ram v. Fela Hard*, 51 C.W.N. 340. But compare *Power v. Hayne*, L.R. 8 Eq. 262, dissenting from *Day v. Day*, supra. As to whether the direction that the annuity be provided out of the proceeds of the property, will make the annuity perpetual or not, vide notes and cases at p. 324, supra. For questions of income tax or super tax in relation to the question of annuity, see *Re Bates* : *Selmes v. Bates*, (1926) 1 Ch. 167 : 94 L.J. Ch. 190.

Rule in the Section is rigid :—It should be noticed that the section does not contain the usual phrase of this Act, namely, "unless a contrary intention appears by the will"; this makes the rule of the section very rigid and the Court jealously gives effect to it. So it has been held that even an express direction that the value of the annuity is not to be paid to the legatee is inoperative, *Re Mabbett*, (1891) 1 Ch. 707. *Vide also Stokes v. Chesk*, 29 L.J. Ch., 292 where Romilly M.R. thus give his reason for awarding the fund itself to the annuitant "It is a useless form to direct a purchase if the annuity is to be sold again." Cf. *Ford v. Bailey*, 17 Beav., 303.

Right of Election :—The section gives the legatee an OPTION either (1) to take the sum or (2) to have it laid out in an annuity, see *Palmer v. Crawford*, *supra*. Cf. *Re Brown's Will*, 27 Beav., 324. We have already seen under sec. 188, ante, that a legatee is entitled to take the bequeathed fund notwithstanding any direction in the will restricting the mode of enjoyment by him; and, a direction for investment by him; and, a direction for investment in the purchase of an annuity is nothing but a restriction on the mode of enjoyment. So the rule of this section necessarily follows from the said sec. 188. *Vide also Pitman v. Hallarrow*, (1891) 1 Ch. 707; *Ashton v. Ross*, (1900) 1 Ch. 162.

Annuity subject to condition :—The principle of this section will not apply, and the fund itself will not be paid to the legatee, if his interest is cut short by reason of nonfulfilment of any conditional limitation imposed upon the gift, see *Hatton v. May*, 3 Ch. D. 148. In the case of an annuity subject to a condition, if the fulfilment of the condition is not personal with the legatee, it can be fulfilled by the legatee's executor, *Re Goodwin*; *Ainslie v. Goodwin*, (1924) 2 Ch., 26.

Commencement of Annuity :—When no time is fixed for its commencement, an annuity will commence from the testator's death, and the first payment will be made at the expiration of a year next after that event, see 338, *infra*; *Gibson v. Bott*, 7 Ves., 967; *Fearns v. Young*, 9 Ves., 553: As to the position where the will directs that the right to draw annuity will commence on the completion of the 21st year of the legatee, see *Richard v. Giuseppe*, A.I.R. 1937 P.C. 301=170 I.C. 737 (P.C.). Where the annuity is directed to be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month (as the case may be) after the testator's death, though its actual payment may be deferred for a year, sec. 339, *infra*; also *Storer v. Prestage*, 3 Madd. 167; *Houghton v. Houghton*, 1 S. & Stn 390. As to dates of successive payments, *vide* sec. 340, post. Where the will provides for payment of annuity after the death of a tenant for life, the annuity gets accelerated upon disclaimer by the life-tenant, *Midland Bank v. Morrison*, (1948) 1 Ch. 300.

175. [Suc. S. 162] Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

N. B.—This section is applicable to Hindus etc.

Abatement of Annuity:—When the assets left by the testator are insufficient to pay all the legacies, the annuities abate proportionately or *pari passu*, with the other pecuniary legacies, *vide Hume v Edwards*, 8 Atk. 693; *Innes v. Michell*, 2 Phill. Ch. O. 346; *Lewin v. Lewin*, 2 Ves. Sim. 417; *Miller v. Huddlestons*, 3 Mac. & G. 513; *Re Twiss : Barclays Bank Ltd. v. Pratt & Co.* (1941) 1 All E.R. 93 (Ch. D.). This is so, because the annuities are nothing but legacies, and the annuitants are in no better position than the legatees, *Sibley v. Perry*, 7 Ves., 592. In working out abatement, the annuities should be first valued, *Wrington v. Colquhoun*, 1 De G. & Sm. 357; *Long v. Hughes*, 1 De G. & Sm. 364. For abatement of general legacies, see sec. 327 *post*.

Valuation or capitalisation of Annuity:—As to how an annuity is valued or capitalised, see *Re Ruston*, 3 Cal., 736; *Todd v. Deslby*, 27 Beav., 358; *Folts v. Smith*, L.R. 8 Eq. 689. When valuation of annuity is necessary, it should be made at the date of the order, and where annuities are bequeathed free of Annuity free of Income income-tax, the date of income-tax prevailing on the tax. date of the order has to be taken into account, *Re Twiss : Barclays Bank Ltd. v. Pratt & Co.*, (1941) 1 All E.R. 93 (Ch. D.). An annuity given free of all deductions under a will is not given free of income-tax, *Hooper Philips v. Steel*, (1944) 1 All E.R. 227—(1944) 1 Ch. 171.

Priority:—This section does not say anything about any claim of priority in respect of any annuity, though under sec. 176, *post*, an annuity has a priority over a residuary gift. Where however a priority is claimed by an annuitant, the onus is on him to establish by clear proof that such priority was intended by the testator, *Miller v. Huddlestons*, *supra*.

Payment and apportionment of Annuities:—*Vide* notes under secs. 338-340, *post*. For the mode of investment of fund to provide for annuities, *vide* sec. 343, *post*.

176. [Suc. S. 162] Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

Where gift of annuity and residuary gift, whole annuity to be first satisfied.

N. B.—This section is applicable to Hindus etc.

Priority of Annuity over Residuary Gift:—In the matter of payment, an annuity has precedence over a *residuary* legacy, and the necessary consequence is that where the testator's assets are insufficient the loss falls on the residuary legatees. *Croly v. Weld*, 3 De G. M & G. 993. This follows from the very legal position of the residuary legatee who takes only the *surplus* or *residue*, if any, see. 102, *supra*; *vide* the notes at pp. 202-203, *ante*; also *Croly's case, supra*; *Percy v. Percy*, 35 Beav., 295; *Anderson v. Anderson*, 33 Beav., 293; *Baker v. Farmer*, 8 Ch. 537; *Re Tootal's Estate*, 2 Ch. D., 628.

Capital or Corpus of the property may be applied in payment of Annuity:—If the income of the testator's estate is insufficient for payment, of the annuity, even the corpus of the estate can be applied for the purpose. *Re Howarth, Howarth v. McKinnon*, (1902) 2 Ch. 19 (C.A.). As to when the annuitant's right will be limited to the segregated fund, read *Richard v. Giuseppe*, A.I.R. 1937 P.C. 301 = 170 I.C. 737 (P.C.).

CHAPTER XXI.

OF LEGACIES TO CREDITORS AND PORTIONERS.

177. [Suc. S. 164] Where a debtor bequeaths a legacy to Creditor *prima facie* his creditor, and it does not appear from the entitled to legacy as will that the legacy is meant as a satisfaction well as debt. of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

N. B.—This section is applicable to Hindus etc. The general principle of this section applies even to wills not governed by the Act, *Namberumal Chetti v. Veeraprumal Pillai*, 59 M.L.J. 596 = 1981 M.W.N. 224 = 32 L.W. 768 = A.I.R. 1930 Mad. 956 = 128 I.C. 689.

Effect of the Section:—The effect of the section is to abolish in India the Doctrine of Satisfaction applied in England with respect to certain legacies in favour of the testator's creditor, *Hassonally v. Popatlal*, 37 Bom. 211 : 14 Bom. L.R. 782 : 17 I.C. 17; *Rim Piari v. Brijrani*, 1959 A.L.J. 529 = A.I.R. 1969 All. 509.

English Law:—The established rule of the English Courts of equity is that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it is presumed, in the absence of any intimation of a contrary intention,

that the legacy was meant as a satisfaction of the testator's debt, *Williams on Executors*, 10 Ed. 1041; but where the amount of the legacy is less than that of the debt, it is taken as a part payment or part satisfaction. This rule is not now much in favour even with the English Judges, and they readily depart from it and make an exception on the slightest pretext of a distinguishing feature or fact. Cf. *Re Rattenberry* (1906) 1 Ch. 667; *Thomas v. Burnet*, 2 P. Wms. 348; *Thynne v. Ghiyall*, 2 H.L.C. 154; *Nicholls v. Judson*, 2 Atk. 300; *Jeffries v. Michels*, 20 Beav., 15; *Clark v. Sewell*, 8 Atk. 98; *Calham v. Smith*, 64 L.J. Ch. 325; *Carr v. Estabrooke*, 3 Ves. 561.

Reason of the Departure from the English Rule:—The Law Commissioners have themselves thus given the reason: "We have departed from the English law where its provisions appeared to us to be objectionable in themselves, or especially inapplicable to India. Above all things we have aimed at giving effect to the plain meaning of the words of the testator, without endeavouring to do or say for him that which he has not done or said for himself. We have accordingly discarded the rules by which the English Courts are compelled to presume, in the absence of any intimation to the contrary, that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, the legacy is meant by the testator to be a satisfaction of the debt; that where a parent, who is under a legal obligation to provide a portion for his child, fails to do so, and afterward bequeaths a legacy to the child the legacy is meant to be a satisfaction for fulfilment of the obligation (sec. 178). We have in like manner discarded the rule of English law that where a father bequeaths a legacy to a child and afterwards advances a portion for that child, he thereby adepts the legacy (sec. 179), *vide Gazette of India*, July 1st, 1884, p. 54.

Creditor Prima facie entitled to Legacy as well as Debt:—A bequest to the testator's creditor *prima facie* entitles him to get both the legacy and the debt and no presumption of satisfaction is to be raised in this country as is done in England, *vide supra*. Thus a Khoja Mahomedan who was indebted to his brother to the extent of Rs. 9,000, bequeathed to him an equal amount saying "to my brother I give Rs. 9,000 as *bakshis*," and it was held that the brother was entitled to both the sums. *Hassonally v. Popallal*, 57 Bom. 211; 14 Bom. L.R. 782: 17 I.C. 17. The principle of this section applies only in the absence of an intimation in the will that the legacy is meant as a satisfaction of the debt. So, it has been said that where a testator has left no uncertainty as to the person to be benefited and the property conferred, the Courts are precluded by this section from going outside the actual words used by the testator. *Pestonji v. Framji*, 12 Bom. L.R. 868: 8 I.C. 180; *Ram Peeri v. Brijram*, 1969 A.L.J. 529 = A.I.R. 1869 All. 509. Read also the Law Commissioners' Report quoted above.

Meant as a Satisfaction:—This section will not apply where the testator intends to satisfy the debt by means of the legacy, *vide notes, supra*. As to what is

satisfaction, *vide Story, Eq. Jurisprudence*, § 1099; *Re Harlock*, (1895) 1 Ch. 616.

178. [Suc. S. 166] Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Illustration.

A, by articles entered into in contemplation of his marriage with B covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

N. B.—The section applies to Hindus etc.

What is portion:—A *portion* is a provision made for a child by a parent or by a person standing in *loco parentis*, that is, a person in the position of a parent, or assuming parental duties in relation to the child. Cf. *Re Dawson* (1919) 1 Ch. 102; *Jugjivandas v. Brijdas*, 7 Bom. L.R. 299. As to in what respects it differs from an advancement, *vide* notes at p. 71, *ante*. *Portioneer* is the person who enjoys the portion.

Child prima facie entitled to Legacy as well as Portion:—When a legacy is given to a child, to whom a portion is due, such child is entitled to both the legacy and the portion, of course, in the absence of contrary intimation in the will itself.

Compare this section with the preceding one. Under the English Law.

English law in such a case the Doctrine of satisfaction is applied. Cf. *Copley v. Copley*, 1 P. D. 147; *Ex parte Pys*, 18 Ves., 153; *Bruen v. Bruen*, 2 Vern., 439; but this section has made a departure from the English law, *vide* the Law Commissioners' Report, quoted at p. 829, *ante*.

179. [Suc. S. 166] No bequest shall be wholly or partially deemed by a subsequent provision made by No ademption by subsequent provision for settlement or otherwise for the legatee.

Illustrations.

(i) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby ademed.

(ii) A bequeaths 40,000 rupees to B, his orphan niece whom he had brought up from her infancy. Afterwards, on the occasion of B's marriage, A settles upon her the sum of 80,000 rupees. The legacy is not thereby diminished.

N. B.—This section is applicable to Hindus etc. The general principle of the section applies even to wills not governed by the Act. *Namberumal Chetti v. Veeraperumal Pillai*, 59 M.L.J. 596—1931 M.W.N. 224—32 L.W. 768—A.I.B. 1930 Mad. 986—128 I.C. 689.

No Ademption by subsequent provision for Legatee:—Under the English law, there is a presumption against double portions or two-fold benefits to the legatee, and this section makes a departure from this English rule. *Vide* the quotation at p. 329, *ante*. Under it, there is no ademption of a bequest simply by reason of the fact that subsequently a provision is made for the legatee by way of settlement or otherwise. Compare it with sec. 101, *supra*, and *vide Weall v. Rice*, 2 Russ. & M. 251; *Lord Chichester v. Coventry*, L.R. 2 H.L. 71 (90); *Juggivandas v. Brijdas*, 7 Bom. L.R. 299.

CHAPTER XXII.

OF ELECTION.

180. [Suc. S. 167] Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and in the latter case, he shall give up any benefits which may have been provided for him by the will.

N. B.—This section applies to Hindus etc. It corresponds to sec. 35 of the Transfer of Property Act.

The Doctrine of Election:—ELECTION may, ordinarily, be defined as "the choosing between two rights where there is a clear intention that both were not intended to be enjoyed." The foundation of the doctrine is the intention of the testator and its characteristic is the effectuation of a devise of property not belonging to the testator; Cf. *Dillon v. Parker*, 1 Swans, 362 (386); *Re Vardans Trust*, 81 Ch. D. 275. It proceeds on the principle that the devisee "shall not be allowed to approbate and reprobate, but if he approbates he shall do all in his power to confirm the instrument which he approbates," *Cavendish v. Dacre*, 81 Ch. D. 468; *Mukhun Lal v. Sreekissen*, 12 M.I.A. 167 : 11 W.R. P.C., 11; *Re Dicey*, (1856) 2 All. E.R. 74. It is "a principle not peculiar to English law, but common

to all law, which is based on the rules of justice, viz., the principle that a party shall not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit and disaffirm it, as far as it is to his prejudice," *Rungama v. Atchama*, 4 M.I.A. 1 (108) : 7 W.R. P.C. 57. Cf. *Miller v. Thurgood*, 93 Beav., 496; *Forbes v. Ameroonissa*, 10 M.I.A. 340. A simultaneous approbation and reprobation is not an election either way, *Soma Bai v. Chellam*, 1939 M.W.N. 280 = A.I.R. 1939 Mad. 485. Principle underlying the doctrine of election is an equitable one and is of universal application. It will apply to all wills whenever executed and irrespective of the consideration whether the provisions of Part VI of the Act will apply to the same or not, *Swarnambal Ammal v. Saradambal Ammal*, 1936 M.W.N. 899 = A.L.R. 1936 Mad. 497 = 163 I.C. 752. The doctrine depends upon an implied condition that the devisee will comply with all the provisions of the will, by renouncing the right to his own property, *Mangaldas v. Ranchhodas*, 14 Bom., 438. It enables the testator to dispose of property belonging to another, *Rogers v. Jones*, 3 Ch. D. 688. The operation of the doctrine is not affected by the testator's knowledge that the devised property does not belong to him; see section 182, *infra*; also *Re Brooksbank*, 94 Ch. D. 160; *Whistler v. Webster*, 2 Ves., 871. As to what constitutes an election, *vide* notes under secs. 187 and 188, *infra*; also *Dillon v. Parker, supra*; *Worthington v. Wigniton*, (cited under s. 187). A person accepting a benefit under a will is not precluded by the doctrine of Election from disputing any transaction in which the testator was engaged long before his death and which is not the subject of the will at all, *Ramziyyar v. Mikalakhmi* (1921) M.W.N. 484 : 14 L.W. 33. Power of adoption conferred by a will is a "benefit under the will", *Abdul Halim Khan v. Raja Saadat Ali*, 1 Luck, 739 = A.I.R. 1928 Oudh, 155 = 108 I.C. 817. Cf. *Azim Khan v. Saadat Ali Khan*, 8 O.W.N. 949 = A.I.R. 1931 Oudh, 177 = 196 I.C. 642.

Intention is of utmost importance:—In case of election, the question of intention is one of utmost importance, that is the intention of the testator to dispose of the legatee's property, *vide Dillon v. Parker, supra*; *Re Vardan's Trusts, supra*. Cf. *Purnanundas v. Venayekrao*, 9 I.A. 86 : 7 Bom., 19. Such intention whether express or implied, must be manifest and clear, *Runciffe v. Perkins*, 6 Dow. 149 (179); *Stratton v. Bert*, 1 Ves., 285. *Dashwood v. Peyton*, 18 Ves., 41; *Theilinson v. Woodford*, 13 Ves., 221. It is immaterial whether the testator is labouring under an erroneous belief or a mistaken conception about the ownership of the property, *Mangaldas's case, supra*; *vide* sec. 182; but compare, *Dashwood's case, supra*; *Langston v. Langston*, 21 Beav., 562; *Church v. Kemble*, 5 Sim., 625. See also *Bai Mumubai v. Dossa Morarji*, 15 Bom. 443 (462); *Paru Kuttty v. Chettath*, A.I.R. 1954 Mad. 556—relying on 25 Mad. 361.

Circumstances in which Election takes place:—A question of election arises when the testator, by his will, devises some property which does not belong to him, but belongs to another person and confers some benefit by the will upon such

owner of the property. Under such circumstances the owner of the property can elect either to confirm the disposition or to dissent from it, and in the latter case he must give up the benefit conferred on him by the testator. Thus, the testator devises the property of C, worth Rs. 800, to E, and gives O (the owner of the property) a legacy of Rs. 1,000; here, C is to elect to confirm or dissent from the disposition. If he elects to dissent from the disposition and to retain his own property, he forfeits the legacy of Rs. 1,000. So, where a Hindu widow devised to D the immoveable property she inherited from her husband, although being a limited owner she could not do so, and bequeathed a legacy of Rs. 2,000 to P (her husband's reversionary heir), the Court held, in a suit by P, as reversioner, against D for recovery of the property as well as the legacy, that P must elect either to take the legacy under the will or the property as the reversionary heir of the testatrix's husband, *Mangaldas v. Ranchodas*, 14 Bom., 438. No case of election arises where the property sought to be disposed of does not belong to the legatee, *Kamal Kumari v. Narendranath*, 9 C.L.J. 19 : 1 I.C. 673; *Carendish v. Dacres*, 31 Ch. D. 466; but if such legatee has even a *partial* interest in the property, it becomes a matter of election, *Miller v. Thurgood*, 33 Beav. 496; *Wilkins v. Dent*, 6 Ch. 939. Cf. *Middleton v. Windross*, L.R. 16 Eq. 212; *Cavan v. Putteney*, 2 Ves., 544; 3 Ves., 384; *Rancliffe v. Parkins*, *supra*; *Kuduthiudi v. Venkata..mayya*, 78 I.C. 274.

Application of the Section:—The section makes no distinction between moveable and immoveable properties, between specific and residuary legatees, or between legatees and the next-of-kin. Cf. *Cooper v. Cooper*, L.R. 6 Ch. 19. It applies to all interests whether immediate, remote or contingent, *Wilson v. Townshend*, 2 Ves., 693; *Webb v. Shaftesbury*, 7 Ves., 480. Compare illus (ii) and (iii) of sec. 182, *infra*; it equally applies to vested rights, reversions, remainders etc., *Williams v. Mayne*, L.R. 1 Eq. 519.

Competency of Testator:—For the application of the section it is necessary that the testator should have *competency* to effect the attempted disposition, Cf. *Maxwell v. Maxwell*, 16 Beav., 106; So, where the testator is incompetent to make the bequest by reason of minority, lunacy, coverture, etc., no case of election arises, *Hearle v. Greenbank*, 3 Atk. 69; *Blaicklock v. Grindle*, L.R. 7 Eq. 216.

Estoppel by Election:—An election once made under this section is final, *Dewar v. Maitland*, 2 Eq. 834; *Scarf v. Jardine*, 7 App. Cas 360—The principle being that once the man approves or disapproves, he must stick to the course he has adopted and must not vacillate, Cf. *Douglas Menzies v. Umphelley*, (1908) A.C. 294 (P.C.). Where a husband willed away her wife's *Stridhan* property as his own and made the wife his executrix, which she accepted, the latter or her heirs could not disapprove the transaction which she had once approved, *Lakshmidevamma v. Kesavarao*, A.I.R. 1935 Mad. 1066—159 I.C. 943. Once a person has elected to

take under a will he cannot any more repudiate his liabilities thereunder, *Balaji Vasudeo v. Sadashiv Kashinath*, 88 Bom. L.R. 796 = A.I.R. 1936 Bom. 889 = 165 I.C. 590. The doctrine of this section is subject to the qualification that the election must have been made with full knowledge of the circumstances (*vide* sec. 187, *post*) and it is inapplicable to a person who was in possession from before the date of the will, *Subodh Chandra Niyogi v. Bhubalika Dasi*, 60 Cal. 1406 = A.I.R. 1934 Cal. 856 = 149 I.C. 410. An election made under a misconception will not however be final, *Kidney v. Coussmar* 12 Ves. 186. No person is bound by the principle of election unless he has the knowledge of his right to elect and of the circumstances which would influence his judgment (as a reasonable man) in making the election. *Lalit Mohan v. Nirodamoyi*, A.I.R. 1927 Cal. 494 = 101 I.C. 389; *Subodh Chandra Niyogi v. Bhubalika Dases*, 60 Cal. 1406 = A.I.R. 1934 Cal. 856 = 149 I.C. 410; *Soma Bai v. Chellam*, 1939 M.W.N. 280 = A.I.R. 1939 Mad. 485. Read the notes under sec. 187, *post*. Acceptance of benefit under the will with actual or constructive knowledge of the right to elect operates as an estoppel, *vide* sec. 187 and the cases thereunder. But there is no estoppel if the acceptance is in ignorance of the right, *Sopwith v. Maughan*, 80 Beav. 235. If a person elects to take under a will he is estopped from setting up a title contrary to the provisions of the will, *Probodh v. Harish Chandra*, 9 C.W.N. 809; that is, taking under a will precludes the setting up of an adverse title, *Subodh Chandra Bhubalika Dases*, *supra*; but he will not be precluded by the doctrine of Election from disputing any transaction in which the testator was engaged long before his death, and which is not the subject of the will at all, *Rimayyar v. Mahalakshmi*, (1921) M.W.N. 484. 14 L.W. 33 : 42 M.L.J. 589 : 1922 Mad. 357 : 64 I.C. 481.

Provident Funds Act, sec. 5:—Does not detract from the effect of this section or the next one in any way, *Soma Bai v. Chellam*, (1939) M.W.N. 280 = A.I.R. 1939 Mad. 485.

181. [Suc. S. 168] *An interest relinquished in the circumstances stated in section 180 shall devolve as Devolution of interest relinquished by owner. if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.*

N. B.—This section is applicable to Hindus etc. It corresponds to sec. 35 of the Transfer of Property Act and accords with the earlier English decisions; but the trend of modern English cases is somewhat different; *vide* under the caption, "Difference between the Indian Law and the English Law," below.

Effect of Disclaimer by the Elector-Owner:—If the owner of the property disposed of by the will elects to retain it by disclaiming his interest under the will,

then the benefit which he would have got but for such disclaimer, would go to satisfy the disappointed legatee to the extent of the gift that was attempted to be conferred on him. Thus, in the illustration at p. 383, ante, C forfeits his legacy of Rs. 1,000, out of which Rs. 800 will be paid to B (the disappointed legatee).

Difference between the Indian Law and the English Law :—The English Law of Election is somewhat different from the Indian Law. This difference may be best illustrated by means of an example. Thus, the testator devises C's property (worth Rs. 800) to B, bequeathing at the same time Rs 1,000 to C. Under the Indian Law, C, electing to dissent from the gift by retaining his own property, forfeits the legacy of Rs 1,000. But under the English law he will not forfeit the legacy altogether, but will get Rs. 200 that remains after compensating the disappointed devisee B or shortly stated, we apply in India the doctrine of Forfeiture, whereas in England they apply the principle of Compensation and not of Forfeiture, *Rogers v. Jones*, 3 Ch. D. 688; *Pickessgill v. Rodger*, 6 Ch. D. 171; *Ammalu Achi v. Ponnammal Achi*, 36 M.L.J. 507: (1919) M. W. N. 144: 9 L.W. 202: 49 I.C. 527.

N.B.—In a case of election, the amount of compensation, and the rights generally are ascertained with reference to the date of the testator's death, *Cavendish v. Dacre*, 81 Ch. D. 466; *Hancock v. Pawson*, (1906) 1 Ch., 16.

182. [Suc. S. 169] The provisions of sections 180 and 181 Testator's belief as to apply whether the testator does or does not his ownership innate. believe that which he professes to dispose of by his will to be his own.

Illustrations.

(i) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(ii) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel or lose the estate.

(iii) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death. B must elect to give up the estate or to lose the legacy.

(iv) A, a person of the age of 18, domiciled in India but owning real property in England, to which C is heir at law, bequeaths a legacy to C and, subject thereto, devises and bequeaths to B "all my property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

N. B.—This section is applicable to Hindus etc. It corresponds to sec. 85, para. 2 of the Transfer of Property Act.

Testator's belief as to ownership is immaterial :—The doctrine of election will apply whether the author of the attempted disposition does or does not believe the property in question to be his own. *vide notes at p. 392, ante*; also *Mangaldas v. Ranchoddas*, 14 Bom., 498. So the Court will not speculate on what the testator would have done if he had definite knowledge of the ownership of the property, *Whistler v. Webster*, 2 Ves. Jr. 370; and will not therefore admit evidence to prove that he was aware that the property was not his own, *Couts v Ackworth*, L.R. 9 Eq. 619. Cf. *Cooper v. Cooper*, L.R. 6 Ch. D. 15.

183. [Suc. S. 170] A bequest for a person's benefit is, for Bequest for man's the purpose of election, the same thing as a benefit how regarded for bequest made to himself.

Illustration.

The farm of Sultanpur Khurd being the property of B, A bequeathed it to C: and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it.

N. B.—This section is applicable to Hindus etc.

For the purpose of Election, a bequest for the Legatee's benefit is equivalent to bequest to the Legatee himself :—Thus, a testator bequeaths B's property to C, and bequeaths his own property to his executor with a direction to apply such property for the benefit of B (for instance, in payment of B's debts); here B can elect to confirm or dissent from the testator's disposition.

184. [Suc. S. 171] A person taking no benefit directly Person deriving benefit under a will, but deriving a benefit under it indirectly not put to election.

Illustration.

The lands of Sultanpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultanpur to B, and 1,000 rupees to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to B for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultanpur in opposition to the will.

N. B.—This section is applicable to Hindus etc. It corresponds to sec. 35, para 13 of the Transfer of Property Act.

A person deriving benefit under the will only indirectly need not elect:—The doctrine of election does not preclude a party claiming by the will from enjoying a derivative interest to which he is entitled at law under a legal estate taken in opposition to the will, *Williams On Executors*, 11th Ed., pp. 1182 et seq. Cf. *Grissel v. Swinhoe*, L.R. 7 Eq. 291; *Cooper v. Cooper*, L.R. 6 Ch. D. 21. Thus, a man may be a tenant by courtesy of an estate-tail held by his wife in opposition to a will under which he accepts a legacy, see *Lady v. Pulteney*, 2 Ves. Jr. 544. *Vids* also the illustration to the section.

185. [Suc. S. 172] A person who in his individual capacity Person taking in individual capacity under a will may, in another will may in other character, elect to take in opposition to the will. character elect to take in opposition.

Illustration.

The estate of Sultanpur is settled upon A for life, and, after his death, upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only Child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.

N. B.—This section applies to Hindus etc. It corresponds to sec. 35, para 4, of the Transfer of Property Act.

A person may in one capacity take under the will and dissent from it in another capacity:—This may be illustrated by the following example. C is the

life tenant and his son, D, is the remainder man in respect of a certain estate. Now, the testator gives C's life-estate to B' and gives C, Rs. 1,000. C dies shortly after the testator without election, and D takes out administration of C's estate. As administrator of C's estate, D elects to confirm the bequest by paying to B the income of the property during the interval between the testator's death and C's death. In his individual capacity, being the remainder man, he can keep the estate after the termination of C's life-interest. *Vide* the illustration to the section. Also Williams *On Executors*, 11th Ed. p. 1186. Where a person takes a benefit in one capacity and asserts his right in another no question of election arises, though owing to circumstances the two capacities merge in him, *Deputy Commissioner v. Ram Sarup*, 20 O.C. 243 : 42 I.C. 18. Where a testator, who was indebted to his brother for a certain amount, directed in his will that the amount should be given to his brother, and the brother seeking to recover the amount as a debt, failed, the Court held that the brother was not precluded from subsequently getting the amount as a legacy, *Rajamannar v. Venkata Krishnayya*, 26 Mad. 801.

186. [Suc. S. 172, Exception] Notwithstanding anything contained in sections 180 to 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees.

N. B.—This section applies to Hindus etc. It corresponds to sec. 85, para 5, of the Transfer of Property Act.

Application of the Section:—This section says that where a testator disposes of property belonging to a legatee and makes a bequest in favour of the legatee expressly mentioning that the bequest is in lieu of the legatee's property disposed of by him, if the legatee claims his own property he forfeits the bequests (which is in lieu of his property), but not any other bequest (if there be any) under the same

will. Thus, the testator bequeathed to his nephew all his property including the share of his brother's widow in the ancestral property, and made a suitable provision for her maintenance. The widow accepted the maintenance and then sued for her share in the ancestral property which was bequeathed to the nephew, and the Court held that she was precluded from doing so, by virtue of the provisions of this section, as she must have known that the maintenance was given her in lieu of her share in the ancestral property, *Pramada Dass v. Lakhi Narain*, 12 Cal., 60. Vide also the illustration to the section.

If it is an Exception :—In the marginal notes it is spoken of as an exception to secs 180-185, but it is really an exception to some and not all of them.

187. [Suc. S. 173] Acceptance of a benefit given by a will

When acceptance of benefit given by will constitutes election to take under will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Illustrations.

(i) A is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son B will be absolutely entitled. The will of A gives the estate of Sultanpur Khurd to B, and the estate of Sultanpur Buzurg to C. B, in ignorance of his own right to the estate of Sultanpur Buzurg, allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd. B has not confirmed the bequest of Sultanpur Buzurg to C.

(ii) B, the eldest son of A, is the possessor of an estate called Sultanpur. A bequeaths Sultanpur to C, and to B the residue of A's property. B having been informed by A's executors that the residue will amount to 5,000 rupees, allows C to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultanpur to C.

N. B.—This section is applicable to Hindus etc. It corresponds to sec. 86, para 6, of the Transfer of Property Act. Cf. *Worthington v. Wiginton, infra*.

Acceptance of benefit under a will constitutes Election :—Acceptance of benefit under a will with actual or constructive knowledge of one's right to elect constitutes an election, *Indulala v. Manmatha*, 41 C.L.J. 268. So, it has been said that where there is full knowledge, election may be presumed from acquiescence,

Worthington v. Wigington, 20 Beav., 67. *Vide also Pramada Dasi v. Lakhi Narain*, 12 Cal. 60 (62).

Requisites of this Section:—In order to apply the doctrine of election by acquiescence under this section (i) the elector should have knowledge of his right to elect, (ii) and of those circumstances which would influence the judgment of a reasonable man in making an election, or (iii) he shall waive enquiry into the circumstances. Cf. *Ardesofe v. Bennet*, 2 Dick., 463; *Dewar v. Maitland*, L.R. 2 Eq. 834; *Lalit Mohan Banerji v. Nirodamoyi*, A.I.R. 1927 Cal. 494–101 I.C. 899. Therefore, where a legatee has been in receipt of a provision under the will for a long time, being ignorant of his right to elect, he will not be estopped under this section, *Sopwith v. Maughan*, (1861) 80 Beav., 295. Likewise, there is no election, where the party against whom the doctrine is invoked, was never aware, nor ever informed of his right, see *Triguna Sundari v. Radharani*, 87 C.L.J. 20 (following *Sopwith v. Maughan, supra*) ; or of the circumstances of the case, *Subodh Ch. Niyogi v. Bhulalika Dasi*, 60 Cal. 1406 = A.I.R. 1934 Cal. 866 = 149 I.C. 410. Cf. *Gopi Koer v. Rajroop Koer*, 78 I.C. 191. As to the effect of ignorance of the "circumstances" contemplated by this section, *vide*, *Dillon v. Parker*, 1 Swans. 369 ; and *Subodh Ch. Niyogi's case, supra*; read also the notes at p. 387, ante.

Acceptance : Acquiescence :—As to what are acts of acceptance, acquiescence etc., *vide Rumbold v. Rumbold*, 3 Ves., 65; *Simpson v. Vickers*, 14 Ves., 341.

188. [Suc. S. 174] (1) Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

[Suc. S. 175] (2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to B an estate to which C is entitled, and to C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to B.

N. B.—This section is applicable to Hindus etc. It corresponds to sec. 35, paras 7 and 8, of the Transfer of Property Act.

Sub-sec. (1): Circumstances in which knowledge or waiver is presumed :—The knowledge or waiver, referred to in the last section (sec. 187) will be presumed

if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent. *Vide Roberts v. Gordon*, 6 Ch. D. 581. Compare also *Sopwith v. Maughan*, 80 Beav. 285, in which the benefit was enjoyed for 16 years in ignorance of the right to elect. Under this sub-section, in such a case knowledge will be presumed in the absence of evidence to the contrary. This means that the presumption referred to herein is a rebuttable one. *Dewar v. Maitland*, L.R. 2 Eq. 834; *Indubala v. Monmatha*, 41 C.L.J. 258 : A.I.R. 1926 Cal. 724 : 87 I.C. 404. Such presumption will arise both against the elector and the persons claiming through him, *Pramada Dasi v. Lakhi Narain*, 12 Cal. 60. In deciding whether there has been an election or not, the Court always leans towards that construction which is beneficial to the elector. Thus, in the case of a pardanashin lady of high education, when there was no evidence that the will was ever explained to her and the executors never called upon her to make her election, the lady could not be said to have the knowledge that was essential to election. *Indubala v. Monmatha*, 41 C.L.J. 258 : A.I.R. 1926 Cal. 724 : 87 I.C. 404. Cf. also *Harris v. Watkins*, 2 K. & J. 473. *Triguna Sundari v. Radharani*, 37 C. L. J. 20 ; *Gopi Koeri v. Rajroop*, 77 I.C. 191.

Sub-sec. (2) : Circumstances in which knowledge or waiver is inferred :— Such knowledge or waiver will be inferred when by an act of the elector the whole situation is changed and the parties cannot be restored to their original position, *vide*, the illustration ; also *Streatfield v. Streatfield*, Ca. Temp. Talbot, 176 ; *Taleb Hossein v. Ameer Buksh*, 22 W.R. 529 ; *Muhammad Mohidin v. Ottayil*, 1 M.H.C.R. 390. For the same reason where the elector has already created substantial interests in favour of strangers in property which he would lose by the election the strangers' rights are not affected by such election, *Saddik Hussain v. Hashim-ali*, 88 All., 627 : 26 C.L.J. 363 : 21 C.W.N. 130 : 31 M.L.J. 607 : 14 A.L.J. 1248 : 86 I.C. 104 (P.O.).

Difference between the two sub-sections :— Sub-sec. (2) differs from sub-sec. (1) in that it only permits an inference, whereas sub-sec. (1) compels the inference, *Indubala v. Monmatha*, 41 C.L.J. 258 = 87 I.C. 404 (*supra*).

189. [Suc. S. 176] If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election ; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

N. B — This section applies to Hindus etc. It corresponds to sec. 85, para 9, of the Transfer of Property Act.

When Testator's Representatives may call upon Legatees to elect :—If the person who has the right to elect under sec. 160 does not do so within one year after the testator's death, then the testator's representatives after the expiration of that period shall call upon him to elect, and in case of his non-compliance with such requisition within a reasonable time, there will be a statutory presumption of his having confirmed the will. Under the English law, no time is fixed for election ; but when a time is fixed, default to elect within that time is taken as election against the instrument. Cf. *Streatfield v. Streatfield*, Ca. Temp. Talbot, 176.

190. [Suc. S. 177] In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

N.B.—This section is applicable to Hindus etc., being the last section mentioned in Schedule III. It corresponds to sec. 35, last paragraph, of the Transfer of Property Act, (IV of 1882).

Election in case of Disability:—In case of disability, two courses are open, either (1) the right of election is extended till the termination of the disability, or (2) the right is exercised by some competent authority on behalf of the person under disability.

English Law:—Under the English law in the case of infants, the ordinary practice is to hold an enquiry whether it is advantageous to them to elect or to disclaim, *Brown v. Brown*, L.R. 2 Eq. 481-86. In the case of lunatics, the Court in Lunacy has power to elect, *Re Earl of Sefton*, (1898) 2 Ch. 378.

CHAPTER XXIII.

OF GIFTS IN CONTEMPLATION OF DEATH.

191. [Suc. S. 178] (1) A man may dispose, by gift made transferable in contemplation of death, of any moveable property which he could dispose of by will.

(2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

(3) Such a gift may be resumed by the giver ; and shall not take effect if he recovers from the illness during which it was made ;

nor if he survives the person to whom it was made.

Illustrations.

(i) A, being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death,—

a watch :

a bond granted by C to A :

a bank-note : [See *Miller v. Miller*, 3 P.W. 356.]

a promissory note of the Central Government endorsed in blank :

a bill of exchange endorsed in blank :

certain mortgage-deeds. [See *Duffield v. Hicks*, 1 Bl. N.S. 497.]

A dies of the illness during which he delivered these articles.

B is entitled to—

the watch :

the debt secured by C's bond :

the bank-note :

the promissory note of the Central Government

the bill of exchange :

the money secured by the mortgage-deeds.

(ii) A, being ill, and in expectation of death, delivers to B the key of a trunk or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents or to A's goods of bulk in the warehouse. [See *Jones v. Selby*, Pr. Ch. 800; *Smith v. Smith*, 2 Str. 953.]

(iii) A, being ill, and in expectation of death, puts aside certain articles in separate parcels and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels. [See *Bunn v. Markham*, 7 Taunt 284].

Analysis of the Section:—(1) This section applies only in respect of *desirable* moveable property ; (2) The gift must be made in contemplation of death ; that is, when the donor is ill and *expects* to die *shortly* of his illness. (3) The gift takes effect if the donor dies of the illness, and not if he recovers from it ; (4) it does not take effect if the donor survives the donee ; (5) the gift must be made by *delivery* of the property in question ; (6) the gift is revocable by the donor.

Hindu Law:—This section finds no place in Schedule III of the Act, and therefore, under sec. 58 (1), *supra*, cannot apply to Hindus &c. Of course, there

are some traces of *donatio mortis causa*, in the old Hindu law, *vide* Pollock's Ancient Law, p. 228, but there seem to be no definite provisions relating to it in the system of Hindu jurisprudence. For fuller information on the subject, see *Upenira Krishna v. Nabin Krishna*, 3 B.L.R., O.C. 118; 12 W.R., O.C. 4; *Visalatchi Ammal v. Subhu Pillai*, 6 M.H.C.R. 270; *Suddasook v. Ram Chunder*, 17 Cal., 620.

Mahomedan Law:—This section does not apply to Mahomedans, *vide* sec. 58(1), *supra*. The Islamic jurisprudence has got its own system of law relating to *donatio mortis causa* or death-bed gifts. *Vide* author's Lawyers' Anglo-Mahomedan Law, pp. 383-394. Under the Mahomedan Law the death illness is called *marr-ul-maut* and to constitute it three elements are necessary (i) proximate danger of death, so that, there is a preponderance of apprehension of death; (ii) there must be some degree of subjective apprehension of death in the mind of the sick person; (iii) there must be some external indicia, such as inability to attend to ordinary avocations of life. *Vide Bibi Jinjira v. Fukirulla*, 49 Cal. 477; 31 C.L.J. 444=26 C.W.N. 749; *Hassaral Bibi v. Golam Jaffer*, 3 C.W.N. 57; *Fatima Bibi v. Ahmad Baksh*, 31 Cal 319 (upheld by P.C. in 35 Cal 271; 7 C.L.J. 122); *Sirabai v. Rihabai*, 30 Bom., 587; *Ibrahim v. Sarboor*, 35 Cal. 1(22); 6 C.L.J. 695, P.C.; *Wazir Jan v. Satyyad Altaf*, 9 All., 367; *Rashid v. Sherbanor*, 31 Bom., 264. Cf. also 33 All., 283; 40 All., 288; 42 Cal. 361; *et seq.*; read a very learned Article in 1 C.L.J. 107 (n).

Donatio Mortis Causa:—Is a gift made by a person in his last illness and on apprehension of approaching death by delivery of moveable property to the donee who is to keep it in the event of the donor's death from that illness (*vide* sub-sec. 2); such a gift is revocable by the donor, and does not take effect if the donor recovers from the illness or survives the donee. (Sub-sec. 3). See the following cases, *Veal v. Veal*, 27 Beav., 303; *Dufield v. Hicks*, 1 Bls., N.S., 497; *Blount v. Burrow*, 1 Ves., 546; *Walter v. Hodge*, 2 Swans. 92; *Ward v. Turner*, 2 Ves. (Fen.) 481, 441; *Miller v. Miller*, 8 P. Wms. 356. Two important points should be noticed, (i) a gift in contemplation of death is revocable, and therefore ambulatory like a will; (ii) it is a conditional gift depending on the condition of the donor's death of the particular illness and before the donee. A gift under this section relates to "succession" within the meaning of the Act and therefore the donee is entitled to have a succession certificate in respect of it under sec. 372, *post*. *Dolly Edelwaise v. Mallakin*, I L.R. (1943) All. 193=1942 A.L.J. 731=1943 A.W.R. (H.C.) 1=A.I.R. 1948 All. 95=205 I.C. 381. Consult secs 5, 6 and 8 of Estate Duty Act (84 of 1958).

Sub-sec. (1): Moveable property:—Under this sub-section it is only devisable moveable property that can be disposed of in contemplation of death. With the expansion of commerce, the following also are now regarded as moveable properties:—(a) Bank notes (*Miller v. Miller*, *supra*); (b) negotiable instruments,

bills of exchange etc., *Veal v. Veal, supra*; *Rankin v. Wegelin*, 29 L.J. Ch. 323; (c) money bonds, policies of insurance, etc., *Witt v. Amis*, 50 I.J.Q.B. 818; *Amis v. Witt*, 33 Beav., 619; *Snellgrove v. Baily*, 3 Atk. 214; *Westcott v. Kaye*, L.R. 6 Eq. 198; *Bank v. Beck*, L.R. 18 Eq. 489.

Sub-sec. (2): In contemplation of Death:—A gift is said to be made in contemplation of death where the donor is ill and expects to die shortly of his illness, *vide sub-sec. (2)*. The word "shortly" does not necessarily mean a few days; it may mean several weeks or even months, *Gardiner v. Parker*, 8 Madd. 184; *Duffield v. Hicks, supra*. The mere fact that the donor is seriously ill or is in peril of death will not do; but he must *expect* to die; that is, there must be a subjective apprehension of death in him, *Re Kerley*, 522. The burden of proof is on the donee to show that the gift was made in contemplation of death, *Cosmahan v. Grice*, 15 Moo. P.C. 216.

Delivery of Possession:—In order to be operative as a *donatio mortis causa*, the subject-matter of the gift must be actually made over to the donee who is to keep it as a gift in the event of the donor's illness terminating fatally, *Powell v. Hollins*, 26 Beav., 261; *Ward v. Turner*, 2 Ves. 481. If actual delivery is impracticable, constructive delivery may do, *Ibid.*; also *Burn v. Markham*, 5 Tamit, 232. If the possession of the property be already with the donee, according to English decisions, no delivery is necessary, *Cain v. Moon*, (1896) 2 Q.B. 983; *Wing v. Merchant*, 57 Me. 989; but having regard to the principle enunciated in *Shibendra v. Secretary of State*, 34 Cal. 207: 5 C.L.J. 390 and *Sheikh Hushmat v. Sheikh Jameir*, 23 O.W.N. 513, and to illus. (iii), one must pause a while before endorsing this English view. Compare old sec. 90 of the Indian Contract Act. In England, even inchoate or imperfect delivery is considered sufficient, *U. L. S. Bank v. Waverberg*, (1916) 1 Ch. 195. Cf. *Re Lee Treasury Solicitor v. Parrott*, 87 L.J. Ch. 594; *Andrews v. Andrews*, 71 I.J.Ch. 676. The section does not say anything about acceptance of the gift by the donee; but Acceptance. the words "delivers to another" suggest such acceptance. Cf. *Visalatchi Ammal v. Subbu Pillai*, 6 M.H.C.B. 270; *De Levellain v. Evans*, 39 Cal. 120. Cf. secs. 54, 122 and 129 of the Transfer of Property Act.

Sub-sec. (2):—A gift in contemplation of death is revocable, see at p 344, ante. It does not take effect if the donor recovers from the illness or survives the donee, see at p. 344, ante.

PART VII.

PROTECTION OF PROPERTY OF DECEASED.

"Part V (now Part VII) deals with protection of the property of the deceased. It is largely based on the Succession (Property Protection) Act, 1841 (XIX of 1841). This Act was framed under the old system of drafting and certain slight verbal changes of language have had necessarily been made in introducing its provisions in the consolidated Bill, but reference will be made under the appropriate clauses to all changes which are other than purely verbal"—*Notes on Clauses of the Original Bill.*

"The amendments made are purely drafting amendments"—*Joint Committee Report.*

The Scheme of this Part:—The scheme of this Part is as follows: *First*, a person must have died possessed of moveable property, and the same must have been taken or alleged to have been taken upon some pretended claim of right by gift or succession. Then it contemplates that it shall be open to any person claiming a right by succession to the property of the deceased to make application to the Judge of the Court of the district where any part of the property is found or situate for relief and that application for relief must clearly take the nature of a plaint in a summary suit, *Muhammadhas v. Bas Hawalai*, 26 Bom L.R. 145: A.I.R. 1924 Bom, 507: 80 I.C. 269.

192. [Suc. P. P. A. S. 1] (1) *If any person dies leaving property, moveable or immoveable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.*
 Person claiming right by succession to property of deceased may apply for relief against wrongful possession.

[Suc. P. P. A. S. 2] (2) *Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.*

Object of the Part:—The object of this Part (as of the Act XIX of 1841) is to protect the property appertaining to large estates in case of a dispute as to succession. It really provides a speedy relief against wrongful possession in cases of succession by summary proceedings, *Kishnadevanand Ramjee v. Kapildeo*.

Ramjee, 91 Pat. 197 = A.I.R. 1942 Pat. 251 = 198 I.C. 535. It stands, in some respects, in a similar position to sec. 145 Cr. P. Code with respect to certain specified properties whereas its scope is large in as much as it embraces all properties moveable and immoveable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in a proper Court, *Biso Ram v. Emperor*, 28 Cr. L.J. 286. A.I.R. 1922 Pat. 372 : 66 I.C. 76. The section is designed to protect property, but it is to be used where exceptional grounds for prompt action are necessary, *Khaja Kutbuddin v. Khaja Faisuddin*, 2 N.L.R. 72; *Jagoji v. Manmohan Nath*, 37 P.L.R. 1904 ; 7 P.R. 1904.

Application for possession by party claiming Succession :—This section empowers a person claiming a right by Succession to some property to apply to the District Judge within whose jurisdiction the property is situate to be put in possession thereof by ousting a trespasser or to prevent the seizure or invasion thereof by a trespasser, *vide* sub-sec. (1), *Gop Krishna v. Bag Krishna*, 12 C.L.J. 8 : 8 I.C. 259. In order to bring this Part into operation, it is not necessary that succession should be claimed from the last deceased proprietor, *Benode Behary v. Rat Sundar Dassya*, 58 Cal 687 = 30 C.W.N. 600 = A.I.R. 1926 Cal 779 = 94 I.C. 688. The words "right" and "possession" in the section show that the only question before the District Judge relates to the right of possession and to the question of a preferential claim to such possession as between rival claimants, *Bhabatarani Debi v. Prafulla Kumar Mukherjee*, 36 C.W.N. 871 = 140 I.C. 576. A person who was in possession but dispossessed is entitled to relief hereunder and it is not necessary that possession should have been wrongfully taken by a trespasser to be proceeded against, *Parekh v. Bathela Sugriva*, I.L.R. (1944) Nag. 262 = 1944 N.L.J. 74 = A.I.R. 1944 Nag. 152 = 218 I.C. 209. Sub-section (2) provides that where the person upon whom the property devolves by succession is a minor, or is otherwise disqualified, or is absent, the application on his behalf can be made by his agent, relative or near friend or the Court of Wards (as the case may be). It is competent for a shebaati of an idol to present an application hereunder, *Benode Behari v. Rat Sundar Dassya*, 58 Cal 687 = 30 C.W.N. 600 = A.I.R. 1926 Cal 779 = 94 I.C. 688. An application under this section must be made bona fide, sec. 193, *infra*, *Phul Chand v. Kishmish Koer*, 11 C.L.J. 621 : 6 I.C. 610; *Rajit v. Lal Chand*, 138 P.R. 1906 : 116 P.L.R. 1908; *Kunku Lakshmi v. Rukmani*, I.L.R. (1959) Ker. 696 = A.I.R. 1960 Ker. 47.

Property :—The term includes both moveable and immoveable properties. In this respect it is wider in scope than sec. 145, Cr. P. Code, *vide Biso Ram v. Emperor, supra*; the term will not include the interest of a coparcener that passes by survivorship, *Abdulla v. Mirthur*, 28 M.L.J. 537 : 19 M.L.T. 497 : (1919) M.W.N. 1161; 17 I.C. 423. The essence of the section is that the property should pass by succession; so it will not apply to the case of a family governed by the Mit-

Kshara Law inasmuch as in the case of the death of a member the property passes not by way of succession but by survivorship, *Sato Koir v. Gopal Sahu*, 84 Cal. 999 : 12 C.W.N. 65. The section applies even with respect to a portion of a property. So it has been held to cover the case where the claim refers to an undivided share of the estate of the deceased, *Gopi Krishna v. Raj Krishna*, 12 C.L.J. 8 : 6 I.C. 289. The section being inapplicable to cases of survivorship, it will not apply by reason of the mere fact that the parties are governed by the "Chundavand" rule, which is a rule of division of property, because such a rule applies only at the time of, and not till, division of property, *Bua Ditta v. Sahib Diyal*, I.L.R. (1939) Lah. 196 - 41 P.L.R. 766 - A.I.R. 1938 Lah. 763 - 179 I.C. 108. The section applies to multi properties held by mahant, *Krishna Devanand Ramjee v. Kapildeo Ramjee*, 21 Pat. 197 - A.I.R. 1942 Pat. 251 - 198 I.C. 585.

District Judge :—It is only the District Judge of the district in which the property or any part thereof is situate has jurisdiction to entertain an application under this section. So, a Subordinate Judge has no jurisdiction to hear such an application, *Ganga v. Babulal*, 46 I.C. 589 : 72 P.R. 1918 : 81 P.L.R. 1918 : 148 P.W.R. 1918. As to whether the subordinate judge can deal with such an application by virtue of a general assignment of cases to him by the District Judge, vide *Ibid*. In Central Provinces the Deputy Commissioner is the only officer entitled to entertain an application under this section, *Kankaji Rao v. Gangbai*, 9 C.P.L.R. 19. For Berar, see 2 N.L.R. 72 (ref. 6 N.L.R. 49). The senior Subordinate Judge of Delhi has power to entertain an application under Part VII of the Act by virtue of the notification issued by the Lahore Court on 19th September, 1932, *Kalawati v. Surka*, 88 P.L.R. 398 - 161 I.C. 219.

Succession :—The section is not confined to intestate succession but extends to testamentary succession as well, *Benode Behari v. Rai Sundari Dasya*, 63 Cal. 637 - 30 C.W.N. 500 - A.I.R. 1926 Cal. 779 - 94 I.C. 588. The provisions of the Act not being confined to intestate succession alone, the word "succession" in the section refers to testamentary as well as intestate succession, *Champa Devi v. Puran Bai*, A.I.R. 1934 Lah. 930 - 154 I.C. 686. It applies to a case of succession and not to that of survivorship, vide notes under the heading, "Property," supra. The section seems to cover a case where succession is accelerated by surrender of a prior interest, *Abdulla v. Mirthur*, 23 M.L.J. 537 - etc. (supra). If there are directions as to the disposal of the property the judge should give effect to them in a summary proceeding without considering their validity, *Ibid*. When the claim to succession is based on an allegation of heirship, if such heirship depends on the illegitimacy of other people, the applicant is bound to adduce general evidence in support of his case, and then the onus is thrown on the opposite party to prove his legitimacy, *Khajah Mahomed v. Ashrafoonissa*, 2 W.R.P.C. 18. The section being limited to a case of succession, it necessarily follows that if subsequently letters of administration is granted in respect of the property concerned, the person, to

whom the property is consigned hereunder will be bound to restore possession of the property to the grantee of the letters, and this obligation can be enforced by the Court in the exercise of its inherent jurisdiction in the same proceeding just to avoid multiplicity of proceedings. *Sadasheo v. Gujrali*, 1942 N.L.J. 825.

Limitation for application under this Section :— *Vide sec. 905, infra.*

Question of appeal :— An order fixing date of hearing is not an order under this section so as to be appealable. *Bajnath Das v. Mahabat Bamdeo*, 1958 A.L.J. 815 = A.I.R. 1958 All. 663. An order dismissing application under sec. 192 will be final and non-appealable because of sec. 209, *post*, *Smt. Daljit Kaur v. Tarlok Singh*, 1958 A.L.J. 458 = A.I.R. 1958 All. 707.

193. [Suc. P. P. A., S. 3] The District Judge to whom such application is made shall, in the first place, Inquiry made by Judge examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made bona fide.

Shall Examine :— The use of the word "shall" shows that the provisions of this section are rather imperative. [Cf. *Aldulla v. Mirthur, supra*; *Ganga v. Babu Lal, supra*] and should be strictly complied with. *Tarak Chandra v. Satya Charan*, 16 I.C. 504 (Cal.), although in the matter of making further inquiry, it has reserved a discretion for the District Judge. *Tapeswari v. Sukharoja*, 4 D.L.R. (Cal.) 241. It is necessary to consider, (1) whether the opposite party has no title, (2) whether the person claiming is really entitled to property, and (3) whether the person making the application is likely to be materially prejudiced, if left to the ordinary remedy of a regular suit, *Ibid.* The Judge must be satisfied that there are strong reasons for believing that the party in possession has no lawful title before issuing any notice. *Abdul Rahim v. Kuttii Ahmed*, 10 Mad. 68; *Papamma v. Collector of Godavari*, 12 Mad. 341; *Krishnaasumi v. Muthukrishna*, 24 Mad. 364; *Phul Chand v. Kishmish Koer*, 11 C.L.J. 521: 6 I.C. 630; *Bhimappa v. Khanappa*, 84 Bom. 116: 11 Bom. L.R. 1808: 4 I.C. 594. In the repealed Act, i.e., Succession (Property Protection) Act, of 1841, we had the words "enquire by the solemn declaration of the complainant," and it has been held on an interpretation of these words, that, in his judicial discretion, the Judge can act on the affidavit of the applicant, *vide Gopi Krishna v. Roj Krishna*, 12 C.L.J. 8: 6 I.C. 259; *Ghuruku v. Durga Devi*, 65 P.L.R. 1911: 238 P.W.B. 1911: 10 I.C. 820. Cf.

also Oath's Act, V of 1840, and *Bhimappa v. Khanappa*, 84 Bom. 116 : 11 Bom. L.R. 1808 : 4 I.C. 594. But in the present section we have the words 'examine the applicant on oath,' and this amendment, we are afraid, involves, notwithstanding the assurance of the Legislature to the contrary, a change of law rendering action on mere affidavit impossible. Cf. *Jusoda Konwar v. Batu Gourie*, 6 W.R. Mis 53. As to whether the Court can act on the unsupported testimony of the applicant himself, see *Jagji v. Manmohan Nath*, 97 P.L.R. 1904 : 7 P.R. 1904. The judge cannot properly dispense with the examination of witnesses and set upon the report of the Collector only. *Krishnasami v. Muthukrishna*, 24 Mad. 364 (374, 375).

Enquiry by the Judge:—This section provides for the enquiry to be made by the Judge, when an application is made under sec 192. In making an enquiry under this section, in the first place, the Judge shall examine the applicant on oath. As to whether for the purposes of an enquiry under this section, the Judge can proceed on an affidavit or a statement on solemn affirmation of the applicant's agent, vide *Gopi Krishna v. Raj Krishna*, 12 C.L.J. 8 : 6 I.C. 289 ; *Ghuruku Mal v. Durga Devi*, 65 P.L.R. 1911 : 229 P.W.R. 1911 : 10 I.C. 820, and the notes under the heading 'Shall examine' at p. 349, ante. When the petitioner has been examined on oath, it is open to the District Judge to accept or not to accept the statement on oath, and in either case to proceed to ascertain the truth of the matter by further enquiry. No doubt the section gives the Judge a discretion as to whether he should make a further enquiry or not, but such discretion has to be exercised judicially and such further enquiry should not be avoided on such insufficient grounds as the immaterial question of which of the rival claimants lived longer with the deceased, *Tapeswari v. Sukharaja*, 4 D.L.R. (Cal.) 241. The enquiry contemplated by this section is upon two points, *first*, whether the opposite party has lawful title, and *secondly*, whether the applicant is really entitled, whether his application is *bona fide*, and whether he is likely to be materially prejudiced if left to a regular suit, *Phul Chand v. Kishmesh Koer*, 11 C.L.J. 521 : 6 I.C. 690. Cf *Tapeswari v. Sukharaja*, *supra*. The *bona fide* of the applicant must be clear, and it must also be manifest that the party complained against had no lawful title to possession, *Raggi v. Lal Chand*, 188 P.R. 1106 : 116 P.L.R. 1908 ; *Papamma v. Collector of Godavari*, 12 Mad. 841 ; *Gorakhnath v. Bishamber*, 65 P.R. 1882. The provisions of this Part should not be lightly resorted to; it is intended to meet special circumstances and should not be put in motion until the existence of those special circumstances has been clearly established, *Jagoji v. Monmohan Nath*, 37 P.L.R. 1904 : 7 P.R. 1904.

Summary Rejection of Application:—An application under sec. 192 cannot be summarily rejected without first taking the deposition of the petitioner under this section, *Janki v. Ganga Prasad*, (1888) A. W. N. 181.

Effect of non-compliance:—We have seen that the provisions of this section are imperative, 28 M.L.J. 587; 24 Mad. 364 (376); 46 I.C. 589; and should be strictly complied with, 15 I.C. 504 (Cal.). So, a Judge not strictly following this section acts illegally and with material irregularity within the meaning of sec. 116, C.P. Code, 1908, and the High Court will interfere in revision with his order. *Phul Chand v. Krishnesh Koer*, 11 O.L.J. 521 : 6 I.C. 680; *Papamma v. Collector of Godavari*, 12 Mad. 341; *Ghuraku v. Durga*, 65 P.L.R. 1911 : 223 P.W.R. 1911 : 10 I.C. 820. When action is taken without considering the requisites of the section, the High Court will interfere in revision, *Tarak Chandra v. Satya Cheron*, 16 I.C. 504 (Cal.); *Ganga Sahai v. Babu Lal*, 72 P.R. 1918 : 81 P.L.R. 1918 : 46 I.C. 589; *Khaja Kutbuddin v. Khaja Faizuddin*, 2 N.L.R. 72; *Kothandarma v. Jagathambal*, 16 L.W. 934 : (1928) M.W.N. 74 : A.I.R. 1928 Mad 229 : 71 I.C. 82. Omission to make a preliminary enquiry is an irregularity which can be waived by the opposite party and can be cured by the opposite party's contest on the merits of the case, *Jusoda Koonwar v. Baboo Gourree*, 6 W.R. Mis. 58.

Jurisdiction:—Where jurisdiction is conferred by statute on certain terms, such terms must be complied with in order to create or raise the jurisdiction, *Nasserwanji v. Meer Mynoodeen*, 6 M.I.A. 184 (155). For the meaning of the term "jurisdiction", see *Date's case*, L.R. 6 Q.B.D. 876 (451). Cf. *Kanhoji Rao v. Gangabai*, 9 C.P.L.R. 19. Before the judge assumes jurisdiction under this section, it must be found that the provisions of law have been strictly complied with, *Sato Koer v. Gopal Sahu*, 34 Cal. 929 = 12 C.W.N. 66. That is to say, jurisdiction under this section should not be assumed unless it is shown that the party complaining would be materially prejudiced if left to the ordinary remedy of a suit. *Ibid.* Cf. *Jusoda Koonwar v. Baboo Gourree*, 6 W.R. Mis. 58; *Kothandarma v. Jagathambal*, A.I.R. 1928 Mad, 229 : 71 I.C. 82.

Revision:—Non-compliance with the provisions of this section is a material irregularity within the meaning of sec. 116 of the C.P. Code, 1908, and is therefore a good ground for interference in revision, *vide* notes and cases cited under the heading "Effect of non-compliance", above, *Bua Ditta v. Sahib Diyal*, I.L.R. (1939) Lab. 196 = 41 P.L.R. 766 = A.I.R. 1938 Lab. 768 = 179 I.C. 103; read also the notes under the heading "Revision", under sec. 209, *post*. But the High Court will not interfere in revision if there is another remedy open for the aggrieved party, *Ganga Sahai v. Babu Lal*, 72 P.R. 1918 : 81 P.L.R. 1918 : 148 P.W.R. 1918 : 46 I.C. 589 (following 15 P.R. 1901). *Gouri Shankar v. Debs Frasad*, A.I.R. 1929 Nag. 817; *Prem Singh v. Tulsiram*, 44 P.L.R. 109 = A.I.R. 1942 Lab. 151 = 200 I.C. 850. Cf. 40 All. 216 ; 38 All. 647 ; 65 I.C. 195 ; 67 I.C. 945. The High Court will not interfere also when the District Judge in the use of his discretion refused an appointment of Curator on the ground of delay, *Sakharam Lawman v. Vinayak Narayan*, A.I.R. 1927 Nag. 263 = 102 I.C. 622. As to when interference by way of revision is justified, see *Ghuraku v. Durga Devi*, 65 P.L.R. 1911 : 223

P.W.R. 1911 : 10 I.C. 820 ; *Goraknath v. Bishember*, 66 P.R. 1882 ; *Krishnakanti v. Mathu Krishna*, 24 Mad. 364 ; *Abdul Raiman v. Kulus Ahmed*, 10 Mad. 68 ; *Papamma v. Collector of Godaveri*, 12 Mad. 341 ; *Parekh v. Bathela Sugriva*, I.L.B. (1944) Nag. 26 S= 1944 N.L.J. 74 = A.I.R. 1944 Nag. 182 + 218 I.O. 209; There will be no revision on the ground that there has been excessive enquiry. *Kukkuo v. Ram Narain*, 1959 All. L.J. 682.

194. [Suc. P. P. A., S. 4] *If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter, provided) and shall deliver possession accordingly :*

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

Procedure:—This section lays down the procedure the Judge should follow when an application is made under sec. 192, and an enquiry is made under sec. 193. If the Court is satisfied upon such enquiry that there is sufficient ground for believing that the person in possession has no lawful title and that the person applying is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, he should take action under this section, *Jagji v. Mamohun Nath*, 37 P.L.R. 1904 : 7 P.R. 1904 ; Cf *Tarak Chandra v. Satya Chasan*, 15 I.C. 504 (Cal.). The Judge should proceed under this section only if he is so satisfied and not otherwise (subject to the proviso hereunder). He should then (i) summon the party complained against, and (ii) give notice of vacant or disturbed possession by publication, and (iii) after a reasonable time summarily determine the right to possession, and (iv) deliver possession accordingly. Thus, an order under this section can be passed only where the conditions embodied in sec 193 have been fulfilled. *Champi Devi v. Puran Bai*. A.I.R. 1934 Lah. 980 = 154 I.C. 656. Under the Proviso, the Judge will have power to appoint, by making an *ad interim* order on an application, an officer to take an inventory of effects and seal or to secure the same. Such an *ad interim* order can be made only on an application, for the purpose and (it seems) not *suo motu*; it can be made before summoning the party complained against, but must be made in the course of the enquiry, *vide* notes under the heading "Proviso: Officer to take Inventory," below. The provisions of this section are in no way controlled by O XXXII, n. 61 of the

O. P. Code: The section contains no provision for demanding security from the person to whom property is ordered to be delivered under it. *Bhabatarini Debi v. Prafulla Kumar*, 86 C.W.N. 871 = 140 I.C. 876.

Determine Summarily:—After the investigation contemplated by sec. 193 and this section, the Court shall make an order determining the right to possession and deliver possession accordingly. Such an order is of a summary character, [vide *Mohun Lall v. Oolfunnissa*, 11 W.R. 98. Cf. *Maeedunnissa v. Fuzur Beebe*, 4 W.R. Mis. 6] and is not finally decisive on the question of title [*Bhabatarini Debi v. Prafulla Kumar Mukherjee*, 86 C.W.N. 871 = 140 I.C. 876]. It is not finally decisive in the sense that the question of title has ultimately to be fought out by means of a regular suit, but subject to such a regular suit, it is final and not appealable, nor open to review, see sec. 209, *infra*. But it is revisable by the High Court under sec. 115, C.P. Code, 1908. Vide notes under the heading "Revision" at p. 351, *ante*. Cf. Secs. 145 and 146, Cr. P. Code. The disposal of an application for the appointment of a Curator should not be postponed pending the hearing of other connected proceedings, *Sakharam Lazman v. Vinayak Na oyan*, A.I.R. 1927 Nag. 263 = 102 I.C. 622.

A Suit:—A regular suit is the only remedy for an adverse order wrongly made under this section; inasmuch as the summary order under this section is final and not open to appeal or review, sec. 209, *post*. The position is however different in relation to a person to whom subsequently letters of administration are granted, read the notes under the heading, "Succession" at p. 348, *ante*.

Limitation for such suit:—A suit to establish a right to a share in property in respect of which an application under sec. 192 is disallowed, may be brought within 12 years from the date of cause of action, and not within one year from the date of disallowance of the said application, *Momeedunnissa v. Mahomed Ali*, 1 W.R. 39.

Notice:—No order can be passed against a person without allowing him to be heard and to adduce evidence in his defence, *Sato Koer v. Gopal Sahu*, 34 Cal. 929 : 12 C.W.N. 65 ; followed in *Satyendra v. Narendra*, 89 C.L.J. 279. Cf. 26 C.L.J. 149 & 456.

Delay as a ground of rejection of application:—It is open to a District Judge to take into account the delay in the presentation of a Curatorship application and to dismiss it on that ground, *Sakharam Lazman v. Vinayak Narayan*, A.I.R. 1927 Nag. 263 = 102 I.C. 622.

Revision:—Vide notes at p. 351, *ante*; existence of another remedy by suit may affect the question of revisability under sec. 115 of the C.P. Code, *Parekh v.*

P.W.R. 1942 : 10 I.C. 820 ; Goraknath v. Bishember, 66 P.R. 1882 ; Krishnarao v. Martha Krishna, 24 Mad. 364 ; Abdul Rahman v. Kuttii Ahmed, 10 Mad. 68 ; Papomma v. Collector of Godavari, 12 Mad. 341 ; Paresh v. Bapela Sugriva, I.L.B. (1944) Nag. 26 I= 1944 N.L.J. 74 = A.I.R. 1944 Nag. 182 + 218 I.O. 209. There will be no revision on the ground that there has been excessive enquiry, Kukdeo v. Ram Narain, 1953 All. L.J. 682.

194. [Suc. P. P. A., S. 4] *If the District Judge is satisfied that there is sufficient ground for believing, as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly :*

Provided that the Judge shall have the power to appoint an officer, who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

Procedure:—This section lays down the procedure the Judge should follow when an application is made under sec. 192, and an enquiry is made under sec. 193. If the Court is satisfied upon such enquiry that there is sufficient ground for believing that the person in possession has no lawful title and that the person applying is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, he should take action under this section, Jagris v. Mahomed Nath, 87 P.L.R. 1904 : 7 P.R. 1904 ; Cf Tarak Chandra v. Satya Chaitan, 15 I.C. 604 (Cal.). The Judge should proceed under this section only if he is so satisfied and not otherwise (subject to the proviso hereunder). He should then (i) summon the party complained against, and (ii) give notice of vacant or disturbed possession by publication, and (iii) after a reasonable time summarily determine the right to possession, and (iv) deliver possession accordingly. Thus, an order under this section can be passed only where the conditions embodied in sec 193 have been fulfilled. Champi Devi v. Puran Bai, A.I.R. 1934 Lah. 980 + 154 I.C. 656. Under the Proviso, the Judge will have power to appoint, by making an *ad interim* order on an application, an officer to take an inventory of effects and seal or to secure the same. Such an *ad interim* order can be made only on an application, for the purpose and (it seems) not *suo motu*; it can be made before summoning the party complained against, but must be made in the course of the enquiry, *vide* notes under the heading "Proviso: Officer to take Inventory," below. The provisions of this section are in no way controlled by O XXXII, rule 6 of the

C. P. Code. The section contains no provision for demanding security from the person to whom property is ordered to be delivered under it, *Bhabatarini Debi v. Prafulla Kumar*, 36 C.W.N. 871 - 140 I.C. 876.

Determine Summarily :— After the investigation contemplated by sec. 193 and this section, the Court shall make an order determining the right to possession and deliver possession accordingly. Such an order is of a summary character, (*vide Mohun Lall v. Oolsunnissa*, 11 W.R. 98. Cf. *Masedoonnissa v. Fuzun Beesoo*, 4 W.R. Mis. 6) and is not finally decisive on the question of title [*Bhabatarini Debi v. Prafulla Kumar Mukherjee*, 36 C.W.N. 871 - 140 I.C. 876]. It is not finally decisive in the sense that the question of title has ultimately to be fought out by means of a regular suit, but subject to such a regular suit, it is final and not appealable, nor open to review, see sec. 209, *infra*. But it is revisable by the High Court under sec. 115, C.P. Code, 1908. *Vide* notes under the heading "Revision" at p. 351, *ante*. Cf. Secs. 145 and 146, Cr. P. Code. The disposal of an application for the appointment of a Curator should not be postponed pending the hearing of other connected proceedings, *Sakharam Laxman v. Vinayak Na ayun*, A.I.R. 1927 Nag. 263 - 102 I.C. 622.

A Suit :— A regular suit is the only remedy for an adverse order wrongly made under this section; inasmuch as the summary order under this section is final and not open to appeal or review, sec. 209, *post*. The position is however different in relation to a person to whom subsequently letters of administration are granted, read the notes under the heading, "Succession" at p. 348, *ante*.

Limitation for such suit :— A suit to establish a right to a share in property in respect of which an application under sec. 192 is disallowed, may be brought within 12 years from the date of cause of action, and not within one year from the date of disallowance of the said application, *Momeedunnissa v. Mahomed Ali*, 1 W.R. 39.

Notice :— No order can be passed against a person without allowing him to be heard and to adduce evidence in his defence, *Sato Koer v. Gopal Sahu*, 84 Cal. 929 : 12 C.W.N. 65 ; followed in *Satyendra v. Narendra*, 89 C.L.J. 279. Cf. 26 C.L.J. 149 & 456.

Delay as a ground of rejection of application :— It is open to a District Judge to take into account the delay in the presentation of a Curatorship application and to dismiss it on that ground, *Sakharam Laxman v. Vinayak Narayan*, A.I.R. 1927 Nag. 263 - 102 I.C. 622.

Revision :— *Vide* notes at p. 351, *ante*; existence of another remedy by suit may affect the question of revisability under sec. 115 of the C. P. Code, *Parekh v.*

Bathel's Sugriva, I L.B. (1944) Nag. 262 - 1944 N.L.J. 74 - A.I.R. 1944 Nag. 182 - 218 I.C. 208.

Proviso: Officer to take Inventory:—*Vide* notes at p. 362, *ante*. Such an officer can be appointed even if the enquiry under sec. 193 prior to issuing citation has not been concluded; but the word "conclude" suggests that such an enquiry has already been started. So it seems that this *Proviso* does not empower the Judge to appoint any officer to take an inventory before starting an enquiry under sec. 193. An order appointing an officer to take an inventory otherwise than in the course of an enquiry contemplated by secs. 192 and 194, is bad in law, *Abdulla v. Marthur*, 23 M.L.J. 637 : 12 M.L.T. 497 : (1912) M.W.N. 1164 : 17 I.C. 429, and therefore open to revision by the High Court, *vide* the cases under the heading "Revision" at p. 361, *ante*.

195. [Suc. P. P. A., S. 5] If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof:

Provided that, in the case of land, the Judge may delegate to the Collector, or to any officer subordinate to the Collector, the powers of a curator:

Provided, further, that every appointment of a curator in respect of any property shall be duly published.

Appointment of Curator:—This section provides for the appointment of an *interim* curator pending the hearing of the summary proceeding. The condition subject to which a Curator is to be appointed are: (i) that there must be an application under sec. 192 and an examination under sec 193; (ii) that the Judge must be in a position to say upon such application and examination that danger is to be apprehended of *misappropriation, waste* of the property before the summary proceeding can be determined; and (iii) that the delay in obtaining security from the party in possession or its insufficiency is likely to expose the party in possession to considerable risk, *Kothandarama v. Jagathambal*, (1923) M.W.N. 74 : 18 L.W. 984 : A.I.R. 1923 Mad. 299 : 71 I.C. 88 ; *Papamma v. Collector of Gudarat*, 12 Mad.

341; *Madan Gopal v. Narbada*, 11 P.R. 1915 : 17 P.L.B. 1916 : 28 I.C. 246. One or more Curators can be appointed under this section. The authority of such Curators shall continue according to the terms of their respective appointments, and in no case, beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof. So, the appointment of a curator will not come to an end when the curator has not handed over possession of the property, although the summary proceedings have terminated, *Lakhs Chand v. Ram Lal Kapoor*, A.I.R. 1931 All. 428-183 I.C. 414. In case of land, the Collector, or a subordinate of his, can be appointed a Curator (*vide* the first PROVISO). The appointment of a Curator shall be duly published, (*vide* the second PROVISO). *Vide* the cases cited under secs. 193 and 194, *supra*. An omission on the part of the District Judge to state that he is satisfied as regards the necessity of appointing a curator, will not invalidate the order of appointment, *Lila v. Mahange*, 54 All. 188-1931 A. L. J. 974-A.I.R. 1931 All. 632-197 I.C. 634 (F.B.).

Duty of Judge :—Before passing an order under this section, an obligation is imposed on the Judge under secs. 193 and 194 to satisfy himself by some enquiry before citing the party complained against, that there are strong reasons for believing that the party in possession has no lawful title and that the party applying is likely to be materially prejudiced if left to a regular suit, *Papanma v. Collector of Godavari*, 12 Mad. 341. An omission to state that the conditions of appointment have been fulfilled will not make the order of appointment illegal, *Lila v. Mahange*, *supra*.

Officer to take Inventory, or Curator :—An officer to take inventory can be appointed even in the course of the preliminary enquiry whereas a Curator can be appointed only after such enquiry.

Object of appointment of Curator :—*Vide Bisoram v. Emperor*, 23 Cr. L.J. 236 : (1922) P. 372 : 66 I.C. 76 (cited at p. 347, *ante*). Cf. also *Babasab v. Nursappa*, 20 Bom. 437 ; 2 N.L.R. 72. Therefore, a Curator is to be appointed only when prompt action is needed.

196. [Suc. P. P. A., S. 6] The District Judge may authorise the curator to take possession of the property either Powers conferable on generally, or until security is given by the party curator. in possession, or until inventories of the property have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession:

Provided that it shall be in the discretion of the Judge to allow

the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds or other effects.

Powers conferable on a Curator:—The District Judge may authorise the Curator (1) to take possession of the property either (a) generally or (b) until security is furnished by the party in possession, or (c) until inventories have been made under the proviso to sec. 194, and (2) to do any act necessary for the preservation, protection of the property from misappropriation or waste by the party in possession, e.g. Collection of debts, rents etc. [Vide sec. 197 (2), *infra*].

Proviso:—The Judge can in his discretion allow the party in possession to continue in such possession on furnishing security (if deemed necessary). Such continuance in possession will not however affect the Judge's power to direct the taking of inventories or to issue proper orders for the preservation of deeds and effects.

197. [Suc. Cert. S. 23] (1) Where a certificate has been granted under *Part X* or under the Succession Certificate Act, 1889, or a grant of probate or letters of administration has been made, a curator appointed under this Part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

(2) All persons who have paid debts or rents to a curator authorised by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be.

N. B — "This clause is taken from section 28 of the Succession Certificate Act, (VII of 1889), but which as it limits the power of the Curator appropriately falls in this Part of the Consolidated Bill"—*Notes on Clauses of the Original Bill*.

Object of the Section:—The object of this section is (a) to prohibit the Curator (appointed under sec. 195, *supra*) from exercising any authority which can be exercised lawfully by the grantees of a Succession Certificate or by the grantees of probate or letters of administration, and (b) to give protection to all persons who have paid debts, rents etc. to the Curator under the authority of the Court, and (c) to render the Curator liable to account for such debts, rents etc. to the Certificate holder or the executor or the administrator as the case may be.

Collection of Debts, Rents etc. by Curator:—If by the terms of his appointment the Curator is authorised by the Court to receive debts, rents of the property, he will be entitled to do so without any further certificate under Part X and to give acquittance for such payment, see *Bobasab v. Nursappa*, 20 Bom., 437; also *proviso* to sec. 200, *post* and persons making payment to him will be indemnified, sub-sec. (2); so that the certificate holder, or the executor or the administrator (as the case may be) will not be any more entitled to make them pay twice over; but the Curator will be liable to account for his receipts to such certificate holder, executor or administrator.

Object of appointment of Curator:—*Vide Bicaram's case* and the notes at pp. 347 & 354, *ante*.

198. [Suc. P. P. A., S. 7] (1) The *District Judge* shall take from the curator security for the faithful discharge of his trust, and for rendering satisfactory accounts of the same as hereinafter provided, and may authorise him to receive out of the property such remuneration, in no case exceeding five per centum on the *moveable* property and on the annual profits of the *immoveable* property, as the *District Judge* thinks reasonable.

(2) All surplus money realized by the curator shall be paid into Court, and invested in public securities for the benefit of the persons entitled thereto upon adjudication of the summary proceeding.

(3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be taken generally to answer all cases for which the person may be afterwards appointed curator: *but* no delay in the taking of security shall prevent the Judge from immediately investing the curator with the powers of his office.

Amendment:—"The words 'moveable' and 'immoveable' have been substituted for the words 'personal' and 'real'"—*Notes on Clauses of the Original Bill*.

Sub-sec. (1): Security:—Security should be taken from the Curator for the faithful discharge of his trust and for rendering satisfactory accounts of his collections. Such security should be virtually in the nature of an administration bond under sec. 291, *post*. Taking of security is obligatory as is clear from the use of the word "shall." *Vide also* sub-sec. (3).

Remuneration:—The Curator is entitled to reasonable remuneration for his services. Such remuneration should, in no case, exceed 5 p.c. on the moveable

property and on the annual profits of the immoveable property.

Sub-sec. (2) : Investment :—All surplus money in the hands of the Curator should be brought into Court and invested in public securities for the benefit of the person who will be entitled thereto upon adjudication of the summary proceeding. Investments should be made in the manner indicated in the notes under sec. 148, *supra*. Cf. Sec. 20 of the Indian Trusts Act, (II of 1882).

199. [Suc. P. P. A., S. 8] (1) Where the estate of the deceased person consists wholly or in part of land Report from Collector where estate includes paying revenue to Government, in all matters regarding the propriety of summoning the party in possession, of appointing a curator, or of nominating individuals to that appointment, the District Judge shall demand a report from the Collector, and the Collector shall thereupon furnish the same :

Provided that in cases of urgency the Judge may proceed, in the first instance, without such report.

(2) *The Judge shall not be obliged to act in conformity with any such report, but, in case of his acting otherwise than according to such report, he shall immediately forward a statement of his reasons to the High Court, and the High Court, if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector.*

Amendment:—“The words ‘High Court’ have been substituted here and in other places in this Part where they occur for the words ‘Court of Sadar Diwani Adalaut’”—*Notes on Clauses of the Original Bill.*

Report from Collector:—In the case of revenue-paying estates, the District Judge can call for a report from the Collector of the district before issuing citation under sec. 194 or appointing a Curator under sec. 195, but in cases of urgency demanding prompt action, the Judge should not wait for such report; *vide the proviso.*

Value of Collector's Report:—Though this section obliges the Judge to call for a report from the Collector, still he can not act on such report alone, and cannot dispense with the examination of the complainant under sec. 193, *supra*. If he does so, his proceeding will be vitiated by grave irregularity and will be liable to be set aside by the High Court on revision, *Krishnassami v. Muthu Krishna*, 24 Mad. 364 : 7 M.L.J. 78. Though the Judge is not obliged to act in conformity with the Collector's Report, still he cannot altogether disregard it, *vide sub-sec. (2).*

In the event of his disagreement with it, he is to report his reasons to the High Court, and the High Court may accept such reasons, or may over-rule them directing him to act conformably to the Collector's report.

200. [Suc. P. P. A., S. 9] The curator shall be subject to all orders of the District Judge regarding the institution or the defence of suits, and all suits may be instituted or defended in the name of the curator on behalf of the estate :

Provided that an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents : but such express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof.

Institution and Defence of Suits by Curators:—All suits relating to the property under the Curator's management must, subject to the direction of the Judge, be instituted or defended in the name of Curator. In this respect, the position of a Curator is somewhat similar to that of a Receiver, appointed under O.XL of the Code of Civil Procedure. But under this section, previous leave of the Court is not necessary for suit by or against the Curator, though in the conduct of such suits the Curator should abide by the directions of the Court. Notice that the section does not say that the curator must be specifically authorised by the District Judge to institute or defend suits. It simply says that the curator shall be subject to all the orders of the District Judge regarding the institution or defence of suits. *Lakhmi Chand v. Ram Lal Kapoor*, A.I.R, 1931 All. 428—138 I.C. 414.

Proviso: Collection of debts and rents by Curator:—*Vide* notes under sec. 197, *supra*. Authority for such collection should be conferred on the Curator by the Court in the order of appointment, the power to collect debts etc. necessarily carries with it the power to give acquittance for all payments on account of such debts etc. The proviso in express terms refers to "collection of debts or rents" and does not relate to the institution or defence of suits. *Lakhmi Chand v. Ram Lal*, A.I.R 1931 All. 428—138 I.C. 414

201. [Suc. P. P. A., S. 10] Pending the custody of the property by the curator, the District Judge may make such allowances to parties having a *prima facie* right thereto as upon a summary investigation of the rights and circumstances of the parties interested he considers necessary, and may, at his discretion, take security for the repayment thereof with interest, in the event of the

Allowances to apparent owners pending custody by curator.

party being found, upon the adjudication of the summary proceeding, not to be entitled thereto.

Allowance to apparent owners pending enquiry:—Pending the hearing of the controversy between the parties under this Part, if the property be in the hands of the Curator, the Judge can direct him to pay suitable allowances to the party having a *prima facie* title to the property, and can take security from such party for repayment of the allowances in the event of the case being decided adversely to him.

202. [Suo. P. P. A., S. 11] The curator shall file monthly accounts in abstract, and shall, on the expiry of each period of three months, if his administration lasts so long, and upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge.

Curator's Liability for accounts:—The Curator is to file accounts *in abstract* every month, and detailed accounts every three months, as well as upon cessation of his office, and in default he is liable to be punished under sec. 203 (2), *post*.

203. [Suo. P. P. A., S. 12] (1) The accounts of the curator shall be open to the inspection of all parties interested; and it shall be competent for any such interested party to appoint a separate person to keep a duplicate account of all receipts and payments by the curator.

(2) If it is found that the accounts of the curator are in arrear, or that they are erroneous or incomplete, or if the curator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default.

Inspection of Accounts:—All parties who are interested in the proper administration of the property are entitled to inspect the Curator's accounts, and to arrange for the keeping of duplicate accounts by persons separately appointed by him.

Penalty for default in keeping or submitting accounts:—If the Curator does not file accounts in accordance with the provision of section 202, or files erroneous or incomplete accounts or if he fails to carry out the Court's order for production of accounts, he is liable to be punished with fine not exceeding one thousand rupees for such default.

204. [Suc. P. P. A., S. 13] If the Judge of any district has appointed a curator, in respect of the whole of

Bar to appointment of second curator for same property. the property of a deceased person, such appointment shall preclude the Judge of any other district

within the same State from appointing any other curator, but the appointment of a curator in respect of a portion of the property of the deceased shall not preclude the appointment within the same State of another curator in respect of the residue or any portion thereof :

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this Part before another Judge :

Provided, further, that if two or more curators are appointed by different Judges for several parts of an estate, the High Court may make such order as it thinks fit for the appointment of one curator of the whole property.

Bar to appointment of Second Curator for same property :— Appointment of a Curator by one Judge for the entire property of a deceased proprietor precludes the appointment of a second curator in respect of any part of the said property by any other judge, if the property be within one State; but the appointment of a Curator in respect of a portion of the property of the deceased shall not preclude the appointment (within the same State) of another Curator in respect another portion thereof. The principle of this section will not apply if the property be extending over different states.

Simultaneous Proceedings or plurality of proceedings not allowed :— A summary proceeding instituted in one Court in respect of one property bars a similar proceeding in another Court in respect of the same property. Vide the first Proviso. Compare it with the somewhat analogous provision of sec. 14 of the Guardians and Wards Act, (VIII of 1890).

Plurality of Curators :— If two or more Curators are appointed by different judges for different portions of an estate, the High Court may make a suitable order for the appointment of a common Curator for the different parts.

Province :— As to the meaning of the term, see sec 2 (g). Now, there are no provinces—they are all states.

205. [Suc. P. P. A., S. 14] *An application under this Part*

Limitation of time for application for curator. to the District Judge must be made within six months of the death of the proprietor whose property is claimed by right in succession.

*N. B.—*Clauses 204, 205 and 206 (now secs 205, 206 and 207) "have been recast as they are drawn in a form which is no longer employed in modern Acts"—*Notes on Clauses of the Original Bill.*

Limitation for application under sec. 192 :—Such an application must be made within six months of the death of the proprietor whose property is claimed by right of succession. Such Succession is to be traced with reference to the last deceased holder, *Bhimappa v. Khanappa*, 34 Bom. 115 : 11 Bom. L.R. 1808 ; 4 I.C. 694, and not necessarily the last deceased proprietor, *Benode Behari v. Rai Sundari Dassya*, 53 Cal. 637 = 30 C.W.N. 600 = A.I.R. 1926 Cal. 779 = 94 I.C. 688. Thus, one K (a Vatandar) died in 1892. His widow Basawa was entered on the Vatan Register as representative Vatandar and she held the Vatan property until her death in 1907. Within six months of Basawa's death, Khanappa, claimed to be the nearest heir of K, applied for possession of the property under the Curator's Act (now this Part) and the Judge granted her application; on appeal the High Court held that Khanappa was within time, inasmuch as all that was to be decided was who should be put in possession of the property in succession to the last deceased holder, 34 Bom. 115, *supra*. A similar view has been taken also in *Benode Behari v. Rai Sundari Dassya*, 53 Cal. 637 = 30 C.W.N. 600 = A.I.R. 1926 Cal. 779 = 94 I.C. 688, *supra*. The word "proprietor" in the section is wide enough to include the case of Hindu widow, *Kuknoo v. Rnm Narain*, 1968 All. L.J. 682.

206. [Suc. P. P. A., S. 15] *Nothing in this Part shall be*

*deemed to authorise the contravention of any
Bar to enforcement of
Part against public set-
tlement or legal direc-
tions given by a deceased
tions by deceased.* property for the possession of his property after

his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto.

*N. B.—*Nothing in this Part will empower a Judge to do anything in contravention of any public act of settlement or any legal direction of the deceased proprietor. On the other hand, the Judge will always endeavour to give effect to the directions of the deceased proprietor, if he be in a position to ascertain them. As pointed out in a Bombay decision (*Mahmudbhai v. Bai Hawabai*, 26 Bom. L.R. 145 : A.I.R.

1924 Bom. 507 : 80 I.C. 989), the whole law in this Part is really out of date, and there is no great necessity for invoking its aid, inasmuch as the purpose it serves, can be well secured by recourse to the provisions of other statutes.

207. [Suc. P. P. A., S. 16] *Nothing in this Part shall be*

Court of Wards to be deemed to authorise any disturbance of the possession of a Court of Wards of any property ; and in case a minor, or other disqualified person subject to its jurisdiction whose property is subject to the Court of Wards, is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid ; and if the minor or other disqualified person, upon the adjudication of the summary proceeding, appears to be entitled to the property, possession shall be delivered to the Court of Wards.

Analysis of the Section :—(1) If a Court of Wards be in possession of the disputed property, the Judge should not disturb such possession ; (2) In the case of a minor or otherwise disqualified applicant, subject to the Court of Wards, if the Judge decides to issue citation on the opposite party and to appoint a Curator, the Court of Wards should be appointed such Curator without being called upon to furnish security ; (3) In the event of success of such minor or otherwise disqualified applicant, possession of the property should be delivered to the Court of Wards on his behalf.

208. [Suc. P. P. A., S. 17] *Nothing contained in this Part*

Saving of right to bring suit. *shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this Part.*

Remedy of unsuccessful Party :—The remedy of an unsuccessful party in a summary proceeding under this Part is by way of a regular suit. *vide also sec. 194, supra.* In this respect the provisions of this section resemble those of sec. 145 of Cr. P. Code, 1898. *Of Biso Ram v. Emperor,* 28 Cr. L J. 286 : A.I.R. 1922 Pat. 372 : 66 I.C. 76 There being an alternative remedy by way of suit, it is not necessary for the High Court to exercise its revisional jurisdiction in the matter, *Gourishankar v. Dabiprasad,* A.I.R. 1929 Nag 317.

Comparison with sec. 145, Cr. P. C. :—Under sec. 145, success is determined with reference to the question of possession ; but under this Part it is determined *

with reference to the question of right to possession or title, *vide* sec. 198 and 194, *supra*.

Limitation:—A suit to establish a right to a share in property in respect of which an application under this Part is disallowed, may be brought within 12 years from the date of cause of action and not within one year from the date of disallowance of the said application, *Momeedunnissa v. Mahomed Ali*, 1 W.R. 89; *vide also Raja Enayet v. Girdhares Lal*, 11 W.R. (P.O.) 29; 2 B.L.R. 75: 12 M.I.A. 366. Cf. *Loknaraain v. Ram Myna*, 7 W.R. 199, F. B.

209. [Suc. P. P. A., S. 18] The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review.

Effect of a Summary Decision:—A summary decision under this Part has no other effect than that of settling the actual possession. It does not operate as *res judicata* on the question of title or of the right to possession. So, an aggrieved party can establish his such right or title by means of a regular suit under sec. 208, *supra*.

Finality of the Summary Order:—For the limited purpose of settling the question of actual possession, such an order is final and is not subject to appeal or review. Therefore, no appeal lies from the decision of the District Judge under this Part, *Gajadhar v. Megha*, 44 All 546 20 A.L.J. 358: A.I.R. 1922 All 387—relied on in *Sm. Daljit Kaur v. Tarlok Singh*, 1959 A.L.J. 458=A.I.R. 1958 All 707. Cf. *Mohunlal v. Oofunnissa*, 11 W.R. 98. 5 B.L.R. 164. Even when the Judge erroneously frames issues relying on the mistaken consent of the party's pleader, though such mistaken consent is not binding on the party, the Judge's decision will be final, *Jusoda v. Baboo Goursee*, 6 W.R. Mis 53. In order to bar appeal or review, it must be shown that the decision is in a summary proceeding under this Part, *Bajnath Das v. Mahabat Ramdeo*, 1963 A.L.J. 315=A.I.R. 1963 All. 663.

Revision:—Though the Judge's decision is final under this section, still if the order be vitiated by grave illegality or irregularity affecting the question of wrongful exercise, non-exercise or irregular exercise of jurisdiction, within the meaning of sec. 115 of the Code of Civil Procedure, it will be subject to revision by the High Court, *vide* the notes and cases under the headings "Jurisdiction" and "Revision" at p. 351, *ante*; *Bua Ditta v. Sahib Diyal*, 1 L.R. (1989) Lah. 196=41 P.L.R. 766=A.I.R. 1938 Lah. 768=179 I.C. 103. *Comp. Khaja Kutbuddin v. Khaja Faisuddin*, 2 N.L.R. 72; *Sakharam Lawman v. Vinayak Narayan*, A.I.R. 1927 Nag. 248=102 I.C. 622. But where there is an alternative remedy by way of a regular suit, the

High Court will be reluctant to interfere in revision. *Gouri Shankar v. Debiprasad*, A.I.R. 1929 Nag. 817—approving 2 N.L.R. 72, *supra*.

210. [Suc. P. P. A., S. 19] The State Government *may* appoint public curators for any district or number of districts; and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of a curator is left discretionarily with him under this Part.

Appointment of Public Curators:—The State Government may appoint public Curators for any district or group of districts. Where public Curators exist, they should ordinarily be appointed under sec. 195. Compare the State Government's power to appoint Official Receiver under sec. 53 of the Prov Insolvency Act (V of 1920).

PART VIII.

REPRESENTATIVE TITLE TO PROPERTY OF DECEASED ON SUCCESSION.

This is an important portion of the Bill which deals with title to the property of the deceased. It is only by separating these provisions of the law that a clear view can be obtained of the requirements of the Indian law as to grants by the Court in the case of the estate of a deceased person. By separating the law in this manner, the consolidation of those provisions of the law relating to probate and grant of administration which are now contained in the Indian Succession Act, 1865 (X of 1865) and the probate and Administration Act, 1881 (V of 1881), are rendered possible"—*Notes on Clauses of the Original Bill*. Cf. also Joint Committee Report.

211. [Suc. S. 179] (1) The executor or administrator, as the character and property case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

[Pro. S. 4] (2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

Sub-sec. (1): Deceased's Property vests in Executor or Administrator;—The Executor or administrator of a deceased person is his *legal representatives* for all purposes, and all the property of the deceased person vests in him *as such*. This will be the position even where a widow is appointed the executrix *Mt. Ishar Kaur v. Amarnath*, A.I.R. 1933 Lab. 740—146 I.C. 515. The words, "as such" show that the vesting is not of the beneficial interest in the property, but only for the purposes of representation, *Mst. Kalwant Bewa v. Karamchand Soni*, I.L.R. (1939) 1 Cal. 21—68 C.L.J. 8—43 C.W.N. 4—A.I.R. 1938 Cal. 714—178 I.C. 878. For the meaning of the expression *as such*, see also *Basanta Kumar v Bengal Y.A. & I. Co-opt. Society*, 1959 Cal. L.J. 71. Where there are more than one executor, the property vests in all of them, *Amrit Raee v. Sangam Lal*, 1947 O.W.N. 480—A.I.R. 1948 Oudh, 151—204 I.C. 219. The property vests in the executor from the date of the testator's death and in the administrator from the date of the grant. Cf. *Kurrutulain v. Pearsa Saheb*, 33 Cal. 166 : 9 C.W.N. 988; *Jehanger v. Bai Kukibas*, 27 Bom., 281; *Munssami v. Muruthammal*, 20 M.L.J. 689. The effect of such vesting is that the executor or the administrator by virtue

Effect of vesting.

of his office only, that is, merely as such executor or administrator takes an estate in the property of the deceased and a legal character is conferred on him, [*Gurish Chunder v. Broughton*, 14 Cal. 861; *Jehanger v. Bai Kukibas*, 27 Bom., 281 (283)], irrespective of the question whether he is an heir or not, *Kissenal v. Tilak Chandra*, 43 C.W.N. 1218; *Bhudeb Chandra v. Bhik Shankar*, A.I.R. 1942 Pat. 120—196 I.C. 837; Cf. *Kurardas Devchand v. Jeskish Naoroji*, 43 Bom. L.R. 981—A.I.R. 1942 Bom. 54—198 I.C. 609. The position of the grantees of probate or letters of administration is as taking the place of the deceased himself, *Ma Gyi v. Maung Tat*, A.I.R. 1934 Rang. 291—161 I.C. 971. As to the meaning of the expression, "all the property of the deceased," see *Midnapore Zamindari Co. v. Ramkhan Singh*, 5 Pat. 80—A.I.R. 1926 Pat. 130, cited under the next heading. Where there are successive executors or administrators, the representation continues, *Prasanna Kumar v. Golab Chand*, 2 I.A. 145 : 14 B.I.R. 450. So a decree against one executor or administrator binds his successor in office, *Bai Meherbas v. Magan Chand*, 29 Bom., 96; inasmuch as such a decree is binding on the estate itself. The

Continuity of Representation.
Decree against Executor not affected by subsequent revocation.

validity of a decree against the executor is not affected by the subsequent revocation of the grant, *Ma Thein v. Nepean*, 9 Rang. 360—A.I.R. 1931 Rang. 288—133 I.C. 494. Read the notes under the heading, "Effect of Revocation" under sec. 263, post. So far as the heir is concerned, the estate does not vest in the executor "in trust for any specific purpose" within the meaning of sec. 10 of the Limitation Act (now Act XXXVI of 1968), *Vundravandas v. Curson Das*, 21 Bom., 646; *Kherodemoney v. Doorgamoney*, 4 Cal., 455; *Nandlal v. Harlochand*, 14 Bom., 476; *Ayeshabai v. Elrahim*, 82 Bom., 864; but he can be made an express trustee by the will, 2 Bom., 388; Cf. *Nestarani v. Nandlal*, 80 Cal. 369. The estate being vested in him, the executor or the

administrator is a necessary party in all suits relating to the estate; even when the contention is between the persons beneficially interested and a third party, the executor can carry on the suit himself and the beneficiaries need not be impleaded. Cf. *Mohananda v. Akhoy Kumar*, 6 C. W. N. 488; *China Lakshmi v. Naralla Venkata*, 33 M.L.J. 195. Compare also *Nawajee v. Administrator-General*, 88 Mad. 600. If the estate really vests in the executor from the testator's death, it may be asked why the Legislature could deem it necessary to enact sec. 227, validating intermediate act of the executor prior to the grant of probate. Formerly, it was thought that the vesting contemplated by this section was a sort of inchoate or contingent vesting only. Cf. *Jehangir v. Bai Kukibai*, 27 Bom., 281. The Judicial Committee, have, however, recently pointed out that the object of sec. 227 is simply to avoid multiplication of proofs and not to detract from the effect of vesting in accordance with this section. *Kadiyala Venkata Subbamma v. Katreddi Ramayya*, 59 I.A. 112-55 C.L.J. 263-86 C.W.N. 441, P.O.; therefore, an executor even if unequipped with a grant of probate will be competent to do all acts incidental to his office, excepting those in connection with legal proceedings in Courts, for which sec. 213 expressly requires a previous forensic equipment, read also *Pandarang Shamrao v. Dwarkadas Kallandas*, 35 Bom. L.R. 700-A.I.R. 1933 Bom. 342-146 I.C. 621; *Bhudeb Chandra v. Bhiksham Kar*, 196 I.C. 817. Question of title and forensic recognition are different things. A man may have title and may validly deal with the property, although he may have no recognition from the Court. See *Kadiyala Venkatasubbamma's Case, supra*. Though the

The Executor or administrator takes no absolute or beneficial property, still it is not to be understood that they take any beneficial or absolute interest therein. *Lallubhai v. Mankuar Bai*, 2 Bom. 388; *Sarat Chunder v. Nans Mohan*, 36 Cal., 799; *Mst. Kulwant Bewa v. Karam Chand*, I L.R. (1939) 1 Cal. 21-68 O.L.J. 8-43 C.W.N. 4-A.I.R. 1938 Cal. 714-178 I.C. 873. He takes the estate only for the purpose of administration; so he transmits nothing to his own representative. *De Souza v. Secretary of State*, 14 B.L.R. 423; nor can he ignore the beneficiary.

Brojanath v. Anandmays, 8 B. L. R., O. C. J. 208: notwithstanding the position of the Heir standing the vesting of the legal estate in the executor or Legatee.

the administrator, the beneficial interest in the property remains either with the heir or the legatees. (*Jehangir v. Bai Kukibai*, 27 Bom. 281; *Ramanuja Ammal v. Swami Pillai*, 22 M.L.J. 228; *Antoni Cruz v. Mathes*, 34 Mad., 895: (1910) M.W.N. 272: 20 M.L.J. 9t4: 8 M.L.T. 77: 7 I.C. 242), with the result that the natural heir-at-law's power over his beneficial interest is not cut down by the grant. His such interest is transferable property within the meaning of sec. 6 of the T. P. Act; this section as also sec. 216 of the Act concern themselves with the question of representation only and nothing else. *Mst. Kulwant Bewa v. Karamchand Soni*, I.L.R. (1939) 1 Cal. 21-68 O.L.J. 8-43 C.W.N. 4-A.I.R. 1938 Cal. 714-178 I.C. 873. The legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as the

right under the will is not formally established, *Gopal Lal v. Amulya Kumar*, 59 Cal. 911. Read also the notes under sec. 213, *post*. The English Law doctrine "that the appointment of executors is a gift to them of the personal estate" does not apply to India, *Richard Taylor v. Sri Krishna*, 32 Mad. 443 : 2 I.C. 4. Cf. *Brij Mrherbai v. Mazan Chand*, 29 Bom. 96 (*supra*). So far as the question of legal title is concerned, there is no difference between the Indian law and the English law as both of them make title flow from the will apart from the question of probate, which according to both, simply authenticates the right and dispenses with proof. See *Kadiyala Venkata Subbamma's case*, *supra*. Once an executor has functioned as such, he cannot any more act as an heir, *Venkata Sudarsana v. Andhra Bank Ltd.*, A.I.R. 1960 Andhra Pra. 273.

All the property :—The expression covers both moveable and immoveable property, *Mancharji v. Narayan*, 1 B. H. C. R. 77; in short, it includes all kinds of property, *De Souza v. Secretary of State*, 12 B. L. R. 423; *Behary Lal v. Juggomohun*, 4 Cal., 1; *Midnapore Zemindari Co. v. Ram Kamal Singh*, 5 Pat. 80=A. I. R. 1926 Pat. 130; property wherever situate will vest in the executor or the administrator, *Re Ezekiel*, 21 Bom., 189. The expression must be construed as meaning the actual property of the deceased whether held by him for his own benefit or for the benefit of others, *Midnapore Zemindary Co. v. Ram Kanas*, 5 Pat. 80=7 Pat. L.T. 188=A.I.R. 1926 Pat. 130. (Foll., 12 B.L.R. 423). It seems that the proposition of law has been stated too broadly in this case. It is only the property in which the deceased has a beneficial interest that vests. Property held in trust by the deceased, or that over which he has no disposing power does not so vest, Cf. *De Souza v. Secretary of State*, *rupra*; *Beharilal's case*, *supra*. As to whether the expression "all the property" in the section will include properties mentioned in the will, see A.I.R. 1954 Ajmer, 60. Under sub-sec. (2), in cases of certain classes, the property which would pass by survivorship will not vest in the executor or the administrator, *Lakshamba v. Naidu*, 38 Mad. 369. *Vide* also under the heading "Pass by Survivorship". An executor of a deceased lessee is liable to the lessor to the extent of any assets of the testator which may have come into his hands, although he may not ever have entered into possession of the lease-hold premises. But if he has entered into possession of the property, his liability will not be limited to such assets, and he will then also be personally liable for the rent, *Kameshwara Singh v. Pheroza Merwanji*, 40 C.W.N. 390=165 I.C. 121.

The intention of the Legislature, as appearing from this section seems to be to lay down the general rule that the grant of probate should embrace the entire estate of the deceased. Of course, there are sections in the Act (see Ch. II of Part IX of the Act) which show that grant can be made in respect of portions of the estate under special circumstances. They simply furnish specific instances of the general rule embodied in this section, see *Satpal Ram v. Collector of Multan*,

12 Lab. 584 = 32 P.L.R. 898 = A.I.R. 1931 1 Lab. 310. Read in this connection the observations of Rankin C. J. in *Girijabala v. Manindralal*, 31 C.W.N. 874 = A.I.R. 1927 Cal. 654 = 103 I.C. 692.

Executor :—For definition, *vide* sec. 2 (a). The executor derives his title from the will and not from the probate. The probate is simply the evidence of the executor's appointment. He represents the estate from the date of the testator's death, *Meghraj v. Krishna Chandra*, 46 All. 286 : 22 A.L.J. 193 : A.I.R. 1924 All. 365 : 78 I.C. 243 ; *Bhudeb Chandra Roy v. Bhik Shankar Patnaik*, A.I.R. 1942 Pat. 120 = 196 I.C. 837. So he represents the estate even before he takes out probate, *Shaik Moosa v. Shaik Esa*, 8 Bom. 241 ; *Mathuradas v. Goculdas*, 10 Bom. 468 ; *Narandas v. Narandas*, 31 Bom. 418 (428). Cf. *Sarav v. Bhupendra*, 25 Cal. 103 ; *Myappa v. S. Chetty*, 43 I.A. 113 ; *Kadiyala Venkata Subamma v. Katreddi Ramayya*, 59 I.A. 112 = 55 O.L.J. 268 = 36 C.W.N. 441, P.C. ; 55 Mad. 443 = 63 M.L.J. 365 = 1932 M.W.N. 486 = 84 Bom. L.R. 764 = 1932 A.L.J. 293 = 9 O.W.N. 241 = A.I.R. 1932 P.C. 92 = 186 I.C. 111 (P.C.) ; *Ramcharan v. Dharohar*, 31 Pat. 993 = A.I.R. 1954 Pat. 175 — relying on 43 I.A. 113. *Brojanath v. Anandamayi*, 8 B.L.R. 208 (O.C.J.). For particularly about the position of a Hindu executor, see *Bai Meherbai v. Magan Chand*, 29 Bom., 96. As to how far the executor resembles a trustee or a receiver, see *Moharaj Bibi v. Shyama Bibi*, 30 Cal., 937 ; *Jagat Tarini v. Noba Gopal*, 5 C.L.J. 270 ; also the notes at pp. 366-67, *ante* and *Re Timis* (1902) 1 Ch. 176 ; *Charlton v. Durham*, L.R. 4 Ch. 438 ; *Re Wardamis*, (1908) 1 Ch. 123 ; *Re Whistler*, 35 C.D. 561. The duties that have been cast on the executor make his position very much akin to that of a trustee. To all intents and purposes, he is a trustee, though in name he is not so, *Venkatasubramania v. Siv : Gurunatha*, A.I.R. 1938 Mad 60 = 180 I.C. 462. The intermediate acts of an executor are validated by the grant of probate, *vide* sec. 227. The Judicial Committee (in *Kadiyala's case*) have pointed out that said sec. 227 simply serves to avoid multiplication of proofs (*vide* p. 367). Compare the position of an executor with that of an administrator, below. *Vide* also the notes under the heading "Vesting," and *Re Mackay*, (1906) 1 Ch. 25 (50). For the powers of an executor, read the notes under sec. 805, *post*. Ordinarily speaking, the executors fully represent the estate, but the position would be otherwise where the personal interest of an executor is diametrically opposed to that of the estate, *Sudhir Chandra v. Govinda Chandra*, 15 Cal. 438 = 21 C.W.N. 1043.

Administrator :—For definition *vide* sec. 2 (a). For distinction between Succession and administration, read 63 Bom. L.R. 940 = A.I.R. 1962 Bom. 227 ; also 31 Pat. 993 = A.I.R. 1954 Pat. 175. Unlike the Executor, he derives his title from the grant, before which the estate does not vest in him. (Of. Sec. 212). An administrator has to give an administration bond (sec. 291);* whereas an executor

* In cases other than those of Hindus, Mahomedans, Buddhists, Sikhs, Jaines, Barsi and exempted persons, an administrator who is an attorney of an absent executor, under sec. 241, is exempted from giving a bond.

His position and powers compared with those of an executor. has not got to do so, except in the case contemplated by sec. 291 (2) (b), *infra*. But once he obtains the grant his rights relate back to the date of the death of the person whose administrator he is, see sec. 220; *Antoni Cruz v. Mathes*, 44 Mad. 395 : 20 M.L.J. 984 : 7 I.C. 242 ; but the intermediate acts of the administrator tending to the diminution or damage of the estate are not validated (see sec. 221); *Hatu Baksh v. Debendra*, 29 C.L.J. 58 ; but the executor's position is different (sec. 227). After the grant his powers are very much like those of an executor, *Blackborough v. Davis*, 1 P. Wms. 49 , *vide also* at p. 8, *ante*. *Tench*. p. 474. Cf. *Ambica Churn v. Kula Chandra*, 10 C.W.N. 422. By dealing with the estate before the grant, he becomes an 'executor de son tort', (sec. 303). Cf. *Sudhwanit v. Ram Chunder*, 17 Cal. 620 ; *Kshitish Chunder v. Radhika Mohun*, 35 Cal. 276 : 12 C.W.N. 237. For the power of an administrator, read the notes under sec. 305, *post*, as also *Pestonji v. Bai Meher Ali*, 30 Bom. L.R. 1407 = A.I.R. 1928 Bom. 539 = 112 I.C. 740 and *H. P. Robson v. Administrator General, Punjab*, 30 P.L.R. 503 = A.I.R. 1929 Lah. 753, cited there.

When administration comes to an end :—See 19 Bom. 1, 31 Cal. 89 ; 23 Mad. 216 ; (1921) 2 Ch. 59 ; also *Henderson*, p. 355.

Legal Representative :—For meaning of the term see *King v. Cleaveland*, 4 DeG. & J., 477 ; *Re Best's Settlement*, L.R. 18 Eq. 680 ; *Re Crawford's Trusts*, 2 Drew, 230. Cf. Sec. 2 (11) and O. VII, r. 4 of the Code of Civil Procedure. A Decree against a person who is not a legal representative of the deceased does not bind the deceased's estate, *Administrator-General of Burma v. Chettyar Firm*, 5 Rang. 742 = A.I.R. 1928 Rang. 83.

Position of an Executor before the Hindu Wills Act :—Prior to the Hindu Wills Act, the deceased's estate did not vest in his executor, *Kherodemoney v. Doorgamoney*, 4 Cal. 455 ; *Sarat Chandra v. Bhupendra*, 25 Cal., 103. The executor was simply in the position of a manager, and took no estate in the deceased's property, *Amulyacharan v. Kalidas*, 32 Cal., 861 ; *Administrator-General v. Premlal*, 22 I. A. 107 (114) : 22 Cal. 778 ; *Maniklal v. Mancherji*, 1 Bom., 269 ; *Sakina Bibi v. Mahomed Ishak*, 37 Cal. 899 ; *Lallu Bhai v. Man Kuvar Basu*, 1 Bom. 389 ; *Amulyacharan v. Fazijuddin*, 32 Cal., 718 ; *Jugmohandas v. Pallonjee*, 22 Bom., 1 ; *Girish Chunder v. Broughton*, 14 Cal. 861. *Jaykali v. Shubnath*, 2 B.L.R., O.C. 1 ; *Basanta Kumar Basu v. Lala Ram Sankar Ray*, 59 Cal. 859 = 55 O.L.J. 205 = A.I.R. 1932 Cal. 600 = 188 I.C. 882.

Sub-sec. (2): Pass by Survivorship :—Under this sub-section, when the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person [see sec. 3 (8)], the property which would pass by survivorship does not vest in the executor or the administrator under sub-sec. (1). *Vide Basu*

Harkor v. Maniklal, 12 Bom. 621; *Collector of Ahmedabad v. Savcha-d*, 27 Bom. 140; *Debendra v. Surendra*, 5 Pat. L.J. 107; *Kali Kumar v. Nufabati*, A.I.R. 1928 Pat. 96: 70 I.C. 155; *Shestal Chandra v. Lakshmanee Debi*, 63 Cal. 15; *Durga Prasad v. Jewdhari Singh*, 62 Cal. 788-61 C.L.J. 599.

No letters of administration should be issued in a case, of survivorship and even where it is erroneously granted, the grant is of no legal effect whatsoever, see *Durga Prasad v. Jewdhari Singh, supra*. The reason of the rule is obvious. There is no estate or assets descended from the deceased. The rule applies to all cases where the property is admittedly joint and applies even where the property consists of company shares acquired by the members of a joint Hindu family with joint funds, *Balmukund Dabe, In re*, A.I.R. 1930 All. 82; *Banwari Lal v. Maksudne Lal*, 1930 A.L.J. 280-A.I.R. 1930 All. 99-122 I.C. 183. Read the notes under the heading, "Joint Hindu family" under sec. 216, post, and read there the views of the Bombay Court regarding grant of administration in respect of co-parcenary property.

Position of a Mahomedan Executor:—It is doubtful if a Mahomedan executor can claim to represent the estate of his testator until he has taken probate, *Fatima v. Essa*, 7 Bom. 266; Cf. *Kurrutulain v. Parea Saheb*, 88 Cal. 116; 9 C.W.N. 938. As it is not necessary for a Moslem executor even to take out probate [Shaik Musa v. Shaik Issa, 8 Bom. 241; Sakima Bibi v. Mahomed Ishaque, 87 Cal. 839; *Mahomed Yusuf v. Hargovindas*, 24 Bom. L.R. 753; *Mahomed Hussein v. Aishabai*, 36 Bom. L.R. 1165-A.I.R. 1936 Bom. 84-165 I.C. 934; *Syed Abdul v. Badruddin*, 28 C.W.N. 295] the position of an executor of a non-probated Mahomedan will is really anomalous. *Vide* under sec. 213, post. According to a Bombay decision the entire property of the deceased and not merely the bequeathable third is placed in possession of the executor of a Mahomedan will; (sec. 211, ante) therefore dealings with such an executor by bona fide purchasers are valid, *Azimunnissa v. Ali Khan*, 29 Bom. L.R. 494-A.I.R. 1927 Bom. 387-102 I.C. 129; this is so because the executor has a power of disposition over the property under sec. 307, of the Act unless restricted by the terms of the will, *Akrones Shemasi v. Shaikh Ahmed*, 38 Bom. L.R. 1056-A.I.R. 1931 Bom. 533-135 I.C. 817. According to the Nagpur Court, a Mahomedan will can, no doubt, be admitted to probate although it purports to deal with more than the bequeathable third of his estate, but executor's position in relation to the excess portion of the property is not the same as it would have been if the entire property had been devisable, *Abul Rashed v. Minhasul Haqan*, A.I.R. 1938 Nag. 173-175 I.C. 897.

N. B.—For application of the section to a property situate outside Bombay, *see also Bas Harkor v. Mansklal, supra*.

212. [Sec. S. 190] (1) No right to any part of the property

Right to intestate's property. of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

[Suc. S. 331 & N. C. A., S. 3.] (2) This section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian or Parsi.

N. B.—“This reproduces the important section 190 of Act X of 1865, which requires that no right to any part of the property of a person who has died intestate can be established in any Court without letters of administration. The very important qualification which excludes the operation of this section in the case of the intestacy of Hindus, Muhammadans, Buddhists, Sikhs, Jainas and Indian Christians is based on sec. 331 of Act X of 1865, and section 3 of Act VII of 1903”—*Notes on Clauses of the Original Bill*.

Sub-sec. (1): No right to Intestate's property without Letters of Administration :—The section lays down that where a person dies intestate, no right can be claimed in respect of any part of his property by any body without first obtaining a grant of letters of administration with respect thereto. The effect of this rule is that no dealing is possible with such intestate's property so long as it goes unrepresented from want of a properly appointed administrator. Even a creditor of the intestate's estate cannot proceed against it without first securing proper representation of the estate. Thus, where a creditor sued and obtained a decree against the heirs of an intestate, for the money due from the deceased and attempted to proceed against the intestate's property which was not till then represented, the Court held that the creditor was not so entitled, *Sukhnandan v. Rennock*, 4 All. 192. This section debars a person from proceeding against an unrepresented estate; and if any body wants to proceed against the intestate's property, he ought to take proceedings for the appointment of an administrator, *Framji v. Adarji*, 18 Bom. 337; Cf. *Raj Narain Bose v. Universal Life Assurance Co.*, 7 Cal. 574. This principle will not apply and the section will not be attracted where there is an executor *de son tort* (under sec. 304, post) to represent the deceased estate, *Ratan Bai v. Narayan Das*, 51 Bom. 771—29 Bom. L.R. 900—A.I.R. 1927 Bom. 474—104 I.O. 794. Sec. 304, being a special provision qualifies this section; therefore a case which is within the purview of that section will not be hit by this section, *Mrs Munroe v. Rodrigues*, A.I.R. 1940 Rang. 178—190 I.C. 527. If letters of administration be obtained with respect to certain shares, then the other shares go unrepresented, and the above principle will apply with respect to such unrepresented shares, *Framji v. Adarji*, *supra*. So it has been said that where one of the heirs of a deceased Christian intestate is impleaded in a suit as his legal representative, no right can be established to

any part of the property of the deceased without Letters of Administration, *Tirmoji Krishna v. Rama Piraji*, 20 Bom. L.R. 175 : 45 I.C. 862. It is however worthy of note here (as pointed out in *Mrs. Munroe v. Rodrigues, supra*), that this section says "No right to any part.....can be established"; it does not say, "No remedy against any part of the property etc," The amount under a decree against a family business where the decree was obtained after the father's death against the sons, does not affect the daughter's interest, and this section has no application, *Ahmedabad U. P. Co v. Ardesajur*, 36 Bom., 615 : 14 Bom. L.R. 644 : 16 I.C. 684. This section does not apply where the sons of a deceased Judgment-debtor want to continue the proceeding for setting aside an execution sale started by their deceased father, inasmuch as there is no question of establishment of right to the deceased's property in such a case, *Smith v. Gokul Chandra*, 11 Pat. 424 = A.I.R. 1932 Pat. 234 = 189 I.C. 74. The section speaks of a right to the intestate's property and consequently may not apply where the establishment of the liability of the deceased intestate is sought for, *Ratan Bai v. Narayan Das, supra*. This section does not bar the assertion of a right which is not claimed through the intestate, but independently, *Tuljaram v. Bamanji*, 19 Bom., 828 ; vide also *Harihar v. Harendra*, 37 Cal., 764 ; *Setha v. Hemingway*, 38 Bom., 618. Cf. *Jawahar v. Dkaun Lal*, 14 Mad., 464 ; *Chatakelan v. Karumsar*, 17 Mad. 186; *Re Sultra Krishna Ghosal*, 10 Cal., 554 ; *Chunilal Bose v. Osmond Bibi*, 30 Cal. 1014. As to the sects exempted from the operation of the section, vide Sub-sec. (2), post.

History of the Rule:—The section is founded on the English Law of Personality, which never recognised the heritability of property ; so under that law on the death of a person intestate, his property was taken charge of originally by the Crown, and then by the Church, whose duty was to appoint some person to administer the property. This duty is now carried out by the Probate Division of the High Court. So in every case of intestate death, if it is necessary to deal with the deceased's property, an administrator representing it should be first appointed. Cf. *Framji v. Adarji, supra*.

Section no bar to grant of Succession certificate in respect of an unprobated will in Ajmer:—Read *Ram Swaroop v. Mt. Bhoori*, A.I.R. 1950 Ajmer, 28. That is the position also in relation to the next section, i.e. sec. 213, post.

Sub-sec. (2): The principle of this section does not apply in the case of intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian or Parsi ; the reason for such exemption will be found in the fact that under the personal law of all these sects, upon death the property of an intestate passes by succession to the heirs, and does not go a-begging for a representative, so that the creditor can follow such property in the heirs' hands and is not put to the necessity of securing representation for the intestate's property. Cf. *Jogendra*

Chandra v. Apurna Dasi, 19 C.W.N. 1190; *Re Manavala Chetty*, 83 Mad. 98. *Julietta v. Lila Countinha*, 63 Bom. L.R. 275—A.I.R. 1961 Bom. 275. Although by reason of this sub-section, the grant of letters of administration is not essential in the case of a Hindu intestacy, still where an Insurance company stipulates that the money due under the policy will only be paid to the "assured or his executor, administrator or assign", the policy money can be claimed only on production of the letters or a succession certificate. *Ashutosh Ghose v. Protap Chandra*, 40 C.W.N. 1247. Where company shares stand in the name of a *karta* of a joint *Mitakshara* family, Letters of Administration limited to the said shares can be granted to the next *karta*. *Re Sen Prasad Saraf*, A.I.R. 1954 Cal. 444. The Jews are not exempted from the operation of the section, with the result that the representation of a Jew's estate has to be established under this section, and under sec. 213, in the case of intestacy. *Menahim Yousef v. Islam Aman Saleh*, 83 Bom. L.R. 1222—A.I.R. 1931 Bom. 547—134 I.C. 1167.

Indian Christians:—For definition, *vide* sec. 2 (d); also notes at p. 10, *ante*. **Karen Christians** are Indian Christians and are therefore exempted from the operation of the section, *Ma Nan Thu v. Ma Shwe*, 4 Bur. L.J. 76 : A.I.R. 1926 Rangoon 299—88 I.C. 609; also 63 Bom. L.R. 275—A.I.R. 1961 Bom. 275.

Parsis:—The section does not apply to them now. Cf. however *Framji v. Adarji*, *supra*; *Ahmedabad U. P. Oo's case* *supra*.

Jews:—Read *Menahim Jousef v. Islam Aman Saleh*, 83 Com. L.R. 1222—A.I.R. 1931 Bom. 547—134 I.C. 1167, cited under Sub-sec. (2), *supra*.

213. [Suc. S. 187 & P. A. A. 1903, S. 2(1)] (1) No right as executor or legatee can be established in any Right as executor or Court of Justice, unless a Court of competent legatee when establish- jurisdiction in India has granted probate of the ed. will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

[Suc. S. 331 & H. W. S. 2] (2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57, and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary

civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.

N.B.—This clause "reproduces the corresponding important provision in the case of testate succession contained in sec. 1b7 of Act X of 1865, with the important qualification provided for by sec. 881 of Act X of 1865 and with the application of section 187 of Act X of 1865 read with section 2 of the Hindu Wills Act, (XXIX of 1870)"—Notes on Clauses of the Original Bill. Sub-section (2) was amended by Act xviii of 1929 and it has now been further amended by the Indian Succession (Amendment) Act, 1962.

When the Section does not apply:—The section does not apply unless the claim is for any right as executor or as legatee under the will. Therefore, where a person claims his right as co-trustee under a will, probate of the will is not a condition precedent, *Durai v. Duraisamy*, A.I.R. 1927 Mad. 948 : 105 I.C. 194. This section occurs in Part VIII and not in Part VI and therefore necessarily not in Sch. III; hence provision has been made in sub-sec. (2) to make it clear that sec. 57 will not bring within the operation of this section those classes of wills which are outside clauses (a) and (b) of said sec. 57. The effect of this is that no probate will be necessary hereunder in respect of a Hindu will made at Hyderabad in respect of Hyderabad property, *Pevibhas v. Motwmal Kalachand*, 31 S.L.R. 11 = A.I.R. 1937 Sind 84 = 168 I.C. 55. Read also the Nagpur cases cited under sub-sec. (2), post. For the scope of this section, read generally A.I.R. 1959 Mad. 410.

This section contrasted with sec. 228:—Read *Blackwood & sons v. Parusuraman*, A.I.R. 1959 Mad. 410.

This section if retrospective:—Read I.L.R. (1959) 9 Raj. 311 = A.I.R. 1959 Raj. 243 ; A.I.R. 1957 Raj. 384 (a case under Merwar Succession Act).

Right of the Executor or Legatee established by Grant:—The section says that no right as executor or legatee can be established in any Court without a grant of probate or letters of administration with a copy of the will annexed; so, if an executor or a legatee wants to assert his right under the will, he must be armed with a grant [*Bhudeb Chandra v. Bhikshankar*, A.I.R. 1942 Pat. 120 = 196 I.C. 821]; thus, it has been held that no right as executor can be established in any Court of Justice unless a competent Court has granted probate of the will under which he claims, *Alamalammal v. Suryaprakasoya*, 38 Mad. 968 : 29 M.L.J. (80) : 31 I.C. 491 ; *Bonny v. Edwards*, 12 O.C. 380 : 4 I.C. 781 ; *Brajonath Dey v. Anundamoyi*, 8 B.L.R. 208 ; *Mahabir Das v. Udit Narayan*, 17 Pat. 594 = A.I.R. 1938 Pat. 613 = 178 I.C. 849. Likewise, it has been said that an executor or

administrator can not establish his right until probate or administration has been taken out. *Chuiny Lal v. Osmand Bibee*, 30 Cal. 1044 : see also *Delaney v. Bahamat Ali*, 82 Cal. 710 ; *Administrator-General v. Lalit Mohan*, 12 C.W.N. 738 ; *Narayan Shridhar v. Pandurang*, 34 Bom., 506 : *Dwarkanath v. Raj Rani*, 8 O.W.N. 1198 = 134 I.C. 872 ; 53 M.L.J. 709 = A.I.R. 1927 Mad. 1054 (F. B.)—relied on in *Hem Nolini v. Isolyne*, A.I.R. 1962 S.C. 1471. The executor derives his title from the will and the estate vests in the executor from the moment of the testator's death [Read the notes at p. 366, ante] ; and the grant is not the foundation of his title ; it simply supplies an authenticated evidence of the executor's title for the purpose of use in Courts of law, *Pandurang Shamrao v. Dwarka Das Kaman Das*, 35 Bom. L.R. 709 = A.I.R. 1938 Bom. 343 = 146 I.C. 621. *Comp. Gopal Lal v. Amulya Kunir*, 59 Cal. 911. The effect of this section is to render a will incapable of proof unless probate is taken out where the will is made by a Hindu in territories which in 1870 were under Lieutenant-Governor of Bengal (as, for example, Ajmer-Merwara in the North-Western Provinces), *Manohar Kanwar v. Narain Singh*, 1941 A.M.L.J. 105. This section affects not only the establishment of the legatee's right by himself, but also debars a person from establishing the legatee's right merely as a *jus tertii* for the purpose of his defence, *Lakshmana v. Ratnoma*, 38 Mad. 474 : 25 M.L.J. 556 : 21 I.C. 698 ; *Jogendranath Banerji v. Makhan Lal Banerji*, I.L.R. (1942) 2 Cal. 13 = 75 C.L.J. 189 = 46 O.W.N. 317 = A.I.R. 1942 Cal. 401 = 201 I.C. 588. The words "no right as executor or legatee" will include a person claiming under the executor or legatee, *Haji Mahomed v. Musajt*, 15 Bom. 650, 657 ; *Alam-milammal's case*, *supra* ; *Sukumar Gupta v. Bharat Mandal*, 20 C.L.J. 148 . 26 I.C. 980. This section affects the position only of an executor or a legatee and not of the legal heir, who can therefore, if in possession, of the general estate can maintain a suit for the benefit of the estate so long as any other claimant does not

establish his right to the same under the will, *Basanta Kumar*

Position of the legal heir, or the heir-at-law. *v. Gopal Chunder*, 18 C.W.N. 1136 ; *Gopal Lal v. Amulya Kumar*, 59 Cal. 911. Cf. 59 M.L.J. 596 ; *Babulal Mandal v. Sm. Abalabala*, A.I.R. 1955 Pat 126.

Where the executor appointed under a will has refused to accept office, the right of the heir-at-law to represent the deceased's estate remains unimpeded and he may take action as a "legal representative" within the meaning of sec. 17 of the Limitation Act. *Sivasankara Mudaliar v. Avavvathi Ammal*, I.L.R. (1938) Mad. 533 = (1938) 1 M.L.J. 146 = 1937 M.W.N. 1159 = A.I.R. 1938 Mad. 157 = 174 I.C. 698. Such a legal heir if in possession of the deceased's estate can represent him for the purpose of being sued by a creditor, see *Prosunno Chandra v. Kristo Chaitanya*, 4 Cal. 342 ; *Chuni Lal v. Osmand Bibee*, 30 Cal. 1044, *supra*. Those last two cases were distinguished in *Harish Chandra v. Puridas Das*, 12 C.L.J. 561, in which the executor's application for being substituted in the place of the deceased in the place of the deceased defendant was disallowed and the heirs *ab intesito* were substituted and the Court held that the estate of the deceased was properly represented.

With respect to the question of grant of Probate or Letters of Administration one general principle should always be borne in mind, and that is this : Probate is necessary to establish the representative title of the party concerned and should be granted when prayed for irrespective of the question whether the estate has been administered or not. The question of letters comes in only in the absence of the feasibility of the grant of probate and is very much influenced by consideration of the necessity of administration. Therefore, where the estate has already been fully administered or where there is no necessity of administration, as for example, when there are no debts and the legatees have already entered into possession of the property and there is no necessity for taking further action in relation to the estate, the Courts may not entertain any prayer for the grant of letters of administration. *Chandratara Deb v. Sri Chandra Bhattacharjee*, A.I.R. 1928 Cal. 277. As to the effect of the probate having been obtained, but not filed, read *Bereswar Ghose v. Kumar Veda Kanta*, 2 D.B. 263.

Executor :—For definition, see sec. 2 (c), and notes at pp. 6 & 925 ante. The estate vests in the executor (sec. 211) and his title is perfected by probate (sec. 227); without probate, though the estate vests in him, he cannot enforce his right. He is a necessary party in all suits relating to the estate, so much so that it is not always necessary to implead the real beneficiaries. Cf. notes at p. 866 ante. For executor *de son tort*, see 84 I.C. 154. Executor obtaining probate becomes the testator's legal representative from the time of his death. This follows from the combined effect of this section and sec 211, *Bhudeb Chandra Roy v. Bhik Shakar* A.I.R. 1942 Pat 120 = 196 I.C. 837. Title to property and forensic recognition by Court are different things and should not be confounded (Cf. *Re Ram Chand* A.I.R. 1956 Mad. 274).

Legatee :—This section affects the position of the legatee as well. *Vide* above. Cf. *Monmohan v. Purushnath*, 22 W.R. 174; *Gordhadas v. Scandardas*, 26 Bom. 267. The word *Legatee* includes persons claiming under him, *Haji v. Musaji*, 15 Bom., 659. It includes also the devisee of land, 22 W.R. 174, *supra*. The Legatee can sue for his legacy and for accounts, *Cursetjee v. Dadabhai*, 19 Mad. 425.

Will may be proved otherwise than by Probate :—A will of which no probate has been taken, may yet be proved in a proceeding other than a proceeding under this Act, see *Sarhimungola v. Mahendro*, 4 Cal. 609; *Basanta Kumar v. Gopal*, 18 C.W.N. 1196; *Janaki v. Dhanulal*, 14 Mad. 454.

Admissibility in evidence of unprobated will :—This section prohibits only the establishment of the executor's or legatee's title except by the grant. Therefore, an unprobated will can be admitted into evidence and looked into for a

purpose other than to establish a right as executor or legatee, *Achyutananda v. Jagannath Das*, 21 C.L.J. 96: 20 C.W.N. 122: 27 I.C. 739; *Jogendranath Banerji v. Mukhan Lal Banerji*, I.I.R. (1942) 2 Cal. 18-75 C.L.J. 189-46 C.W.N. 317-A.I.R. 1942 Cal. 401-201 I.C. 688; *Ketaki Ranjan v. Kaliprasanna*, A.I.R. 1956 Tripura, 18. *Vids notes at p. 90, ante* So an unprobated will can be relied on as a proof of an authority to adopt, since an authority to adopt is not a legacy to the widow, and therefore this section will be no bar, *Venkata Narayana v. Subbammal*, 6 M.L.T. 116: 4 I.C. 1046 [on appeal], 38 Mad. 406: 29 I.C. 298, P.C.J. Likewise, an unprobated will can be admitted into evidence to show the intention of the testator with regard to his estate, *Prayag Kumari v. Siva Prasad*, 42 C.L.J. 281: A.I.R. 1926 Cal. 1: 83 I.C. 385. Read also the cases under the next heading.

Whether unprobated will can be pleaded in Defence:—This section does not say that an unprobated will should not be looked into for any purpose whatever. It only says that title cannot be proved to establish a claim as legatee. So the Madras Court at one time held that where it is shown that the person did not die intestate but left a will, a plaintiff who claims adversely to a will is out of Court irrespective of any proof of claim or title by a defendant. Even assuming that a legatee cannot prove his title on an unprobated will, he can use it for a collateral propose, namely, to defeat the plaintiff's title to succeed on the basis of intestacy, *Ganshamdass v. Saraswati*, (1925) M.W.N. 295: 21 L.W. 415: 87 I.C. 621. The implication of this view is that this section will not stand in the way of a defendant putting forward the existence of a will in answer to a plaintiff's claim to a share in the intestate's property, *Ganta Denuvelu v. Gunti Yesuratnam*, A.I.R. 1925 Mad. 1110-87 I.C. 364. Or, shortly stated, absence of probate does not preclude a defendant from relying on a will, *Carla Jatti Chinna v. Oota Wamma*, 33 Mad. 91: 3 I.C. 475. This Madras view accords with the Calcutta cases which held that this section does not debar the use of a will in evidence for a purpose other than the establishment of a right as executor or legatee, *Achyutananda v. Jagannath Das*, 20 C.W.N. 122: 21 C.L.J. 96 (100), citing *Sukumari Gupta v. Bharat Manral*, 20 C.L.J. 148: 26 I.C. 980; *Sarala Sundari Debi v. Hazari Dasi*, 42 Cal. 963; *Basanta Kumar v. Gopal Chandra*, 18 C.W.N. 1186; Comp. *Prayag Kumari v. Siva Prasad, supra*. It did not however accord with an earlier decision of the Madras High Court to the effect that the section debars even an outsider from establishing the legatee's right merely as a *jus tertii* in defence, *Lakshmana v. Ratnama*, 38 Mad. 474: 28 M.L.J. 556: 21 I.C. 698. In another case that High Court has further said in distinct words that a person, who in Court has to prove his title and has to deduce that title from a will, whether that person is plaintiff or defendant, cannot do so without producing probate, *Parthasarathy v. Subbaraya*, 45 M.L.J. 175: A.I.R. 1924 Mad. 67: 72 I.C. 658. Cf. *Rup Chandra v. Raman*, 11 C.W.N. lxxvi. The position has now been

clarified by a subsequent F.B. Madras decision which has distinctly held that a defendant can rely on an unprobated will so long as he does not seek to establish a right under the will. But if his success depends on establishment of such right the will has to be probated, *Ganeshamdas v. Gulab Bi*, 50 Mad. 927 : 89 M.L.T. 481 : 68 M.L.J. 709 ; A.I.R. 1927 Mad. 1054, F.B. The effect of this F.B. decision as pointed out in *Ranjit Kumar v. Subodh Chandra*, A.I.R. 1937 Cal. 252, was to supersede the case of *Ganesham Das v. Sarawati, supra*, and similar other Madras cases. So, where a plaintiff claims title by inheritance, if cannot be defeated by an unprobated will, *Jogendranath Banerjee v. Makhan Lal Banerjee* I.L.R. (1942) 2 Cal. 18 -75 C.L.J. 189-46 O.W.N. 317-A.I.R. 1942 Cal. 401-201 C. 588.

Suit against Executor not obtaining probate: Such an executor can be sued as a defendant if he has intermeddled with the estate of the deceased, *Khajeh Habibullah v. Ananga Mohan Roy*, I.L.R. (1942) 2 Cal. 363-75 C.L.J. 279-46 O.W.N. 719-A.I.R. 1942 Cal. 571-202 I.C. 90.

Non-production of will on which suit is based: In a suit based on a will the Court cannot be expected to construe it, when it is neither produced nor are its terms known. When both the parties are in agreement as to the execution of the will and as to the fact of its being acted upon, it cannot be a case of intestacy and the party founding his title on the will must establish the fact by its production or must fail, *Chandrawati v. Sri Krishna Dwarka*, 1942 O.W.N. 309.

Evidentiary value of Foreign Grant: This section is a rule of evidence; [A.I.R. 1958 S.C. 915]; as to how far a foreign grant (of probate) would operate as a proof of title of executor or legatee, see *Blackwood & sons v. Parusuram*, A.I.R. 1959 Mad. 410.

Grant after institution of suit but before decree, if sufficient:—Under this section, an executor or a legatee cannot establish his right under the will without first obtaining a grant of probate or letters of administration. Now, O. vii, r. 4 of the Code of Civil Procedure, 1908, provides that where a plaintiff sues in a representative character, the plaintiff shall show not only that he has an actual existing interest in the subject-matter of the suit, but that he has taken the steps necessary to enable him to institute a suit concerning it. So, a question naturally arises whether an executor or legatee suing as a plaintiff on the basis of the will should be armed with a grant before the institution of the suit or it will be sufficient if he procures the grant during the pendency of the suit and before the decree. Formerly, there was a conflict of opinion on this point, *Bala Krishnadu v. Narayana-Swamy*, 37 Mad. 175; *Kunkha v. Goshho*, 31 Mad. 187; *Creed v. Creed*, (1918)

1 I.R. 48. But this question has now been settled by the decision of the Judicial Committee, who have held that so long as the compliance with this section is prior to decree, the fact that it is after the institution of the suit makes no difference, and the Court is fully competent to deal with the suit, *Chandra Kishore v. Prasanna Kumari*, 38 I.A. 7 : 38 Cal. 327 : 18 C.L.J. 58 : 15 C.W.N. 121 : 9 M.L.T. 71 : (1911) 2 M.W.N. 30 : 8 A.L.J. 96 : 13 Bom. L.R. 67 : 21 M.L.J. 116 : 4 Bur. L.T. 65 : 9 I.C. 122 (P.O.)—on appeal from 10 C.W.N. 864. See also *Baroda Prosad v. Gajendra*, 9 C.L.J. 383 : *Charu Chandra v. Sarut Chunder*, 12 C.L.J. 587 : *Khajeh Habibullah v. Ahanga Mohan Roy*, I.L.R. (1942) 2 Cal. 363-75 C.L.J. 279-46 C.W.N. 719-A.I.R. 1942 Cal. 571-202 I.C. 90; *Meyappa v. Subramaniyar*, (1916) 1 A.C. 603 ; 43 I.A. 113—relied on in *Ramcharan v. Dharohar*, 31 Pat 993-A.I.R. 1954 Pat. 175 (deals with value of Probate): *Jamsetji v. Hemjbhai*, 37 Bom. 158 ; *M. San v. Ma Chit*, A.I.R. 1930 Rang. 218, Cf. *Patten v. Patten*, (1933) 1 Alo. & Nap. 493 ; *Easton v. Carter*, (1860) 5 Exch. 8 ; *Webb v. Adkins*, (1854) 14 C.B. 401 ; *Newton v. Metropolitan Ry. Co.* (1862) 1 Dr. & Sm. 583 ; *Tarn v. Commercial Bank*, (1884) 12 Q.B.D. 294 ; *Fell v. Lutwidge*, (1740) Barnard C.C. 320 ; *Horner, v. Horner*, (1854) 28 L.J. Ch. 10 ; *Bateman v. Margerison*, (1847) 6 Hare. 496 ; *Charu Chandra v. Nahush Ohandra*, 50 Cal. 49 : 36 C.L.J. 35 : A.I.R. 1928 Cal. 1 : 74 I.C. 630 ; *Raichand Danji v. Jivraj Bhavanji*, 33 Bom. L.R. 1372. A suit by an executor before obtaining probate is maintainable, as he derives his title from the will and not from the probate, and production of the probate, before decree will remove the bar of this section and sec. 214, *infra*. *Soona Mayna v. Soona Navena*, 20 C.W.N. 833 (P.C.) : 18 Bom. L.R. 642 : 35 I.C. 323 (P.C.)—cited also as *Meyappa v. Subramaniar*, *vide* above, and therefore it will be always possible for an executor to institute a suit in anticipation of probate, *Gopal Lal v. Amulya Kumar*, 59 Cal. 911 ; *Prabhatnath Dass v. Ramendra Kumar*, 61 Cal. 1081-A.I.R. 1935 Cal. 158-155 I.C. 64. As to the soundness of the Bombay practice of passing a decree in a suit by an executor or legatee with a direction that the decree is not to be sealed until probate is granted or representation taken out, see *Raichand Danji v. Jivraj Bhavanji*, 33 Bom. L.R. 1372, *supra*.

Sub.sec. (2): Exemptions:—This section does not apply to Mahomedans. *vide* under the heading "Mahomedans" below; also A.I.R. 1961, Guj. 85. It applies to the wills of Hindus etc. only when they are of the classes specified in clauses (a) and (b) of sec. 57, *ante*, and not Cl. (c); *vide* notes at pp. 83-84, *ante*. See also *Ahmed Abdul Latif v. Ghisia*, I.L.R. 1945 Nag. 562-A.I.R. 1945 Nag. 277 [Property in Central Provinces—probate not compulsory]; *Ruprao v. Ramrao*, I.L.R. (1952) Nag. 189-A.I.R. 1952 Nag. 89. Cf. *Jairam v. Bhagirathi*, I.L.R. (1949) Nag. 765-1950 N.L.J. 183. It is not obligatory on a person claiming under a will to which this section does not

apply to obtain probate in order to enforce his right, *Kanniya Lal v. Munsi*, 18 All. 260, following *Krishna Kinkur v. Panchu Ram*, 17 Cal. 272. Cf. 6 Bom. 73. This section requiring a probate does not apply to a will falling under Cl. (c) of sec 57, *Janki Bai v. Durga Prasad*, 1988 A.L.J. 939 = A.I.R. 1988 All. 640. The section has been held to be inapplicable to wills made by Hindus of the Punjab and relating to immovable property situate in the Punjab, *Sohan Singh v. Bhag Singh*, 15 Lah. 898 = 86 P.L.R. 441 = A.I.R. 1934 Lah 599 = 155 I.C. 809. It will not bar a suit for pecuniary legacy unconnected with immoveable property in Madras, *Namberumal Chetti v. Veeraperumal Pillai*, 59 M.L.J. 596 = 1931 M.W.N. 224 = A.I.R. 1930 Mad. 956 = 128 I.C. 689. This sub-sec. (2) read with sec. 57, ante, dispenses with the necessity of a probate for a Hindu will made in Ajmer, *Mohri Lal v. Chhagan Mal*, 1945 A.M.L.J. 51. Read the notes under sec. 57, ante. The words, "This section" here should be read as "preceding sub-section", *Pevibhai v. Motumal Kalashand*, 31 S.L.R. 11 = A.I.R. 1937 Sind. 84 = 188 I.O. 55. Sec. 21 of the Special Marriage Act does not negative the exception made hereby, *Re Hasima Lalji* 63 Bom. L.R. 940 = A.I.R. 1962 Bom. 227

If title can be proved by recitals in unprobated or revoked will: Title to property under will can be established only by means of a grant of probate. It cannot be established by merely relying on recitals in an unprobated will. This principle equally applies to the case where grant of probate is revoked on some ground or other. A revoked will, to all intents and purposes, takes effect like an unprobated will and a recital of title therein is likewise of no use, *Kanjit Kumar Bose v. Subodh Chandra Basu*, A.I.R. 1937 Cal. 252 = 171 I.C. 17

Mahomedans :—They being exempted from the operation of this section, it has been held that it is not obligatory on a Mahomedan executor to take out probate, *vide Shaik Musa v. Shaik Issa*, 8 Bom. 241; *Sakina Bibi v. Mahomed Ishaque*, 37 Cal. 839 = 15 C.W.N. 185; *Mahomed Yusuf v. Hargovandas*, 24 Bom. L.R. 759; *Syed Abdul v. Badaruddin*, 28 C.W.N. 295 (298); A.I.R. 1924 Cal 757; 86 I.C. 1028. A suit based on a Mahomedan will, will not be barred because of absence of probate, *Bai Jilekhabai v. Competent Officer*, A.I.R. 1961 Guj. 85

214. [Suc. Cert. S. 4] (1) No Court shall—

Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons.

- (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or
- (b) proceed, upon an application of a person claiming to

be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of—

- (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or
- (ii) a certificate granted under section 31 or section 22 of the Administrator General's Act, 1913, and having the debt mentioned therein, or
- (iii) a succession certificate granted under Part X and having the debt specified therein, or
- (iv) a certificate granted under the Succession Certificate Act, 1889, or
- (v) a certificate granted under Bombay Regulation No. VIII of 1827 and, if granted after the first day of May, 1889, having the debt specified therein.

(2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

*N. B.—*In clause 214 (1) (a) and in the heading to the Part we have added the words "on succession" as a majority of us are of opinion that the addition is necessary to make it clear that no change has been made in the existing law"—*Joint Committee Report.* For the principle underlying this section, read 47 Bom. L.R. 990—23 I.C. 321. It should be noticed that this section cannot apply unless the suit is against a debtor, *Subedar v. Madhab Prasad*, A.I.R. 1958 Assam, 81.

Scope of the Section: The section is a restrictive section and must be carefully and accurately construed. *Brajendra Sundar v. Niladri Nath Mukherjee*, 57 Cal. 814—50 C.L.J. 289—39 C.W.N. 1177—A.I.R. 1929 Cal. 661—120 I.C. 241 (F.B.). It prohibits the passing of a decree and not the trial of any suit; therefore the question of the section barring the trial cannot be raised as a preliminary issue in the case, *Murje Asu v. Shanji Mavji*, A.I.R. 1950 Kut 96.

Object of the Certificate:—The object of the certificate is the recovery of the debt, *Jhangso Koer v. Dominat*, 17 W.R. 348, and to afford protection to debtors, *Ghaffoor Khan v. Kalandari*, 33 All., 327: 8 A.L.J. 79: 9 I.C. 127, by giving a legal discharge to them, *Champalal v. Lacheribai*, 57 I.C. 641 (Nag.) Cf. *Rattan Singh v. Raj Singh*, 2 Lah. L.J. 578; 63 I.C. 302. The purpose of the section is merely to make it clear that no debt

due to a deceased person can be recovered through Court except by a holder of one of the documents specified in the section, the only exception being either where the claim is made on survivorship, or where it relates to rent, revenue or profits from agricultural lands, *Kissen Lal v. Tilak Chandra*, 43 C.W.N. 1218-71 O.L.J. 57-A.I.R. 1940 Cal. 24.

On Succession:—For the amendment, *vide* the Joint Committee Report, *supra*. This section will have no application unless the claim is on succession. Therefore, it will not apply to a claim based on assignment and not on succession, *Naziul Hasan v. Abdul Wahab*, A.I.R. 1925 Pat. 691-89 I.C. 811. Thus, a childless widowed daughter, who is not entitled to succeed to her father's estate (notwithstanding the possibility of her remarriage), can not claim the debt due to her deceased father as on succession, Cf. *Pramila Devi v. Chandra Sekhar*, 43 All. 450: 19 A.L.J. 272: 60 I.C. 777. When the property is claimed by the right of survivorship and not as "on succession" (that is, not by the right of heirship), this section does not apply, *Sheetal Chandra v. Lakshminarayana*, 63 Cal. 15; *Kissen Lal v. Tilak Chandra*, 3 C.W.N. 1218-71 C.I.J. 57-A.I.R. 1940 Cal. 24-186 I.C. 121; *Basudevanand v. Raghubir*, A.I.R. 1956 Pat. 284. There is no question of succession in relation to a widow claiming by reason of the Hindu Women's Rights to Property Act, (1956) 2 Mad. L.J. 114; *Gangamma v. Venkamna*, 1956 Andhra W.R. 71; but read *Rajendrabati v. Mungalal*, 31 Pat. 477-A.I.R. 1953 Pat. 129, and I.L.R. 1958 Cut. 477. Read also the notes below under the heading, "When Succession certificate is not necessary." The claim contemplated by this section is a claim made by a person in the capacity of a personal representative of a deceased person, *Razman Lalji v. Huridas*, 38 All. 474: 14 A.L.J. 677: 34 I.C. 364. The executor is a representative of the deceased and becomes entitled to his debt as on succession, *Harichand v. Tarachand*, A.I.R. 1943 Pesh. 42-208 I.C. 137 Escheat to the Crown (i.e Government) is not exactly equivalent to Succession and therefore the section does not apply to the case of escheat, *Secretary of State v. Gudhari Lal*, 54 All. 286-1932 A.L.J. 150-A.I.R. 1932 All. 220-136 I.C. 565. No question of a succession certificate arises hereunder in respect of a claim to Provident Fund money of a deceased depositor which vests in his nominees upon the depositor's death, *Subhadrammal v. Kannammal*, (1940) 1 M.L.J. 715-1940 M.W.N. 490-A.I.R. 1940 Mad. 590.

Proof of Representative Title, a condition precedent to recovery of debt due to the Deceased:—The section distinctly and peremptorily lays down that no Court shall pass a decree against a debtor of a deceased person for payment of his debt or execute such a decree except on production of a succession certificate 38 All. 474 (*supra*). So it has been held that no Court shall pass a decree in a suit for recovery of money due on a bond upon

the death of the original plaintiff without the certificate, *Nepusi Bewa v. Nassiruddin*, 27 C.L.J. 400; *Ardrasamuda Aiyangar v. Kalia Perumal*, 24 I.C. 148; *Vairavan Ohettiar v. Srinivasa*, 44 Mad. 499; 40 M.L.J. 481; (1921) M.W.N. 290; 29 M.L.J. 294; 13 L.W. 475; 62 I.C. 944 (F.B.); *Ramanand v. Parkashanand*, A.I.R. 1939 Pesh. 30-183 I.C. 657; *Jadre Bai v. Puranmal*, I.L.R. (1944) Nag. 232-4. I.R. 1944 Nag. 243. A certificate is necessary even in case of a compromise decree, *Santaji Khanderao v. Rivji*, 15 Bom., 105; *Ramratan v. Subhan*, 12 A.L.J. Decree on Compromise 672; 24 I.O. 98. The provision of the section is so imperative, that the Court is not entitled to pass a decree (except on production of certificate) even provisionally or tentatively, *Ma Sein Nya v. Ma Ma Tu*, 2 L.B.R. 164; see *Manesing v. Amad Kunhi*, 17 Mad. 14; the certificate should be actually produced and it is not sufficient to say that the party has secured an order directing issue of certificate, *Mulchand v. Motichand*, 9 Bom., 37. A debt that falls due after the death of the creditor comes within the scope of this section, *Bancharam Majumdar v. Adyanath* 36 Cal. 936; 13 C.W.N. 966; 10 C.L.J. 180 (F.B.)—overruling *Nemdhari v. Bissenwari*, 2 C.W.N. 591. A Succession certificate will not be necessary if any of the other certificates mentioned in the section be forthcoming, *Ramanugrah v. Chunnilar*, 27 I.C. 822 (Cal.). In cases where the other certificates (e.g. probate) are unnecessary not being compulsory, a succession certificate is necessary for realising debts, *Romitti v. Padmanabhan Chetty*, 1932 M.W.N. 872-35 L.W. 264-A.I.R. 1932 Mad. 301-188 I.C. 494. Comp. secs. 370(1) and 372 (1) (e), post. Read also the notes and cases under the heading, "Time for production of Certificate etc.", post. The section being applicable only to decrees or orders for the payment of debts, it will not be made applicable to payment of dividend to a scheduled creditor out of the assets of an insolvent, *Omayachi v. Ramchandria Iyer*, 49 Mad. 951-51 M.L.J. 349=(1926) M.W.N. 560-A.I.R. 1926 Mad. 899-97 I.C. 411. The section also does not absolve the mortgagor from his obligation under sec. 59A of the Transfer of Property Act to pay interest to the heiress of the deceased mortgagee. Omission, to pay such interest on the plea that a Succession certificate is necessary will not prevent such failure from taking effect as a default in payment, with all the consequences attendant on such default, *Kiron Balu v. Atul Kristo*, 45 C.W.N. 628.

Against a Debtor:—This section applies only in respect of a claim against the deceased's debtors, not against his heirs. *Subedar v. Madhab Prasad*, A.I.R. 1958 Assam, 81. Thus, where a Mahomedan dies and his liability to pay the dower debt descends on his heirs, there is no necessity for a succession certificate, *Shadi Jan v. Waris Ali*, 43 All., 493; 19 A.L.J. 429; 64 I.C. 1. Likewise, no certificate is necessary for a suit against a person wrongfully collecting debts due to the deceased's estate,

inasmuch as such a person was not a debtor of the deceased. *Sahab Ram v. Govindi*, 48 All. 440 : 19 A.L.J. 268 : 60 I.C. 774.

Time for Production of Certificate etc.:—It will be sufficient compliance with the requirements of this section if the certificate is produced before decree; this is evident from the words "pass decree", vide the notes and the cases at pp. 379-80, *ante*. Note particularly the two P.C. cases cited there, *viz.*, *Chandra Kishor's case* and *Soona Mayna's case*; read also *Chinna Maricayar v. Avva Nachiar*, (1926) M.W.N. 627-99 I.C. 219, which says that non-production of the certificate is no bar to the maintainability of the suit. The words "pass decree" should be taken literally. *Rajaram v. Malan*, 57 I.C. 650 (Nag.); *Ramnugrah v. Chunnikal*, 27 I.C. 822 (Cal.); *Alice Throp v. Sheikh Sham Lulla*, 3 Pat. L.J. 160; 44 I.C. 793; *Yado v. Anand Rao*, 6 C.P.L.R. 157; *Re Ram Das*, 10 Bom. 107; *Shivaram v. Abdulla*, 1884 P.J. 218; *Shivaram v. Garu*, 1885 P.J. 67; Cf. *Jogendra Lal v. Atindra*, 13 C.L.J. 34: 2 I.C. 638; *Sital Chandra v. Manik Chandra*, 9 C.L.J. 931: 18 C.W.N. 509: 1 I.C. 254; *Kammathie v. Mangappa*, 16 Mad. 454; *Arvamudai v. Kalia Perumal*, 24 I.C. 143 (Mad.); *Mano Singh v. Ahmed*, 17 Mad. 14; *Jawadali Shah v. Kamla-patra*, 18 A.L.J. 514: 56 I.C. 641; *Zapur v. Puran Singh*, A.I.R. 1924 Pat. 525; 5 P.L.T. 504: 78 I.C. 307; *Gulshan Ali v. Zakir Ali*, 42 All. 649: 18 A.L.J. 666: 57 I.C. 55; *Lachmi v. Ganga*, 4 All. 485. The section prohibits the *passing* of the decree and not the *institution* of the suit; therefore, a suit should not be dismissed for non-production of probate or succession certificate, as the case may be, but the Court should grant reasonable time to enable the party to produce it. *Kalyansa v. Tulsabai*, 27 N.L.R. 162-A.I.R. 1931 Nag. 181-184 I.C. 849; *Virebhadrappa v. Shekabai*, 1.L.R. (1939) Bom. 282-41 Bom. L.R. 249-A.I.R. 1939 Bom. 188-182 I.C. 639; *Baldev v. People's Bank of Northern India Ltd*, A.I.R. 1938 Pesh. 1-170 I.C. 58. As to whether a succession certificate can be filed before the Appellate Court, vide *Maung Po Htwa v. Ma, Ngwe*, 1937 Rang. L.R. 396-A.I.R. 1937 Rang. 470, and the notes at p. 386, *post*.

Effect of Non-production:—First opportunity should be given to file the certificate within a specified time. Cf. *Ammasi v. Appalu*, 27 I.C. 234; *Kanchan v. Baijnath*, 19 Cal. 439; *Ghissa v. Ramballabh*, 18 I.C. 368; and the cases cited at p. 386, *infra*. But, if inspite of sufficient opportunity, the certificate is not produced the suit will be dismissed for default; *Arvamudai v. Kalia Perumal*, 24 I.C. 143 (Mad.). Cf. *Sarju v. Ishwari*, A.I.R. 1961 All. 86—relying on A.I.R. 1950 Cal. 564. When the plaintiff takes

adjournment to produce the certificate but makes default Default in filing on in filing it on the adjourned date, his suit will be dismissed not under O. xvii, r. 2, but under O. xvii, r. 8 of

the C. P. Code, 1908, *Droupadi v. S. I. Ry. Co.*, 24 I.C. 353; but such dismissal will not bar a fresh suit; *Mahomed v. Sharifan*, 12 A.L.J. 672: 24 I.C. 18. When the application for succession certificate is still pending, dismissal of a suit for its non-production is bad, *Amir Singh v. Ram Chand*, 94 P.L.R. 1902.

Objection taken for the first time in appeal:—Objection as to want of succession certificate should not ordinarily be taken for the first time in appeal, *Umesh v. Mathura*, 28 Cal. 246: 5 C.W.N. 607; nor in second appeal; *Hukman-nissa v. Abdulla*, 1888 A.W.N. 202. Cf. *Raghunath v. Paresnath*, 15 Cal. 64. But if such objection is allowed in appeal, opportunity should be given to the other side to supply the omission, *Zahur Mian v. Puran Singh*, A.I.R. 1924 Pat. 525: 5 Pat. L.T. 404: 78 I.C. 307. Cf. *Nanha v. Sunda*, 71 I.C. 840. *Vide* also the notes under the heading "Opportunity to be given to file certificate," *infra*.

Opportunity to be given to file Certificate:—We have seen that a certificate can be produced before decree, *vide* at p. 385. Therefore, the Court should not dismiss the suit merely on the objection of the defendant that no certificate has been filed, but should give the plaintiff an opportunity to supply the omission, *Jawad Ali v. Kumpat Rat*, 18 A.L.J. 614: 66 I.C. 641. Cf. *Ching Na v. Shwe Ok*, 19 Bur. L.T. 288: 69 I.C. 807. Such opportunity may be given even at the appellate stage of the suit, *vide* 19 C.W.N. 794 (cited below); especially when the objection as to want of certificate is for the first time taken in appeal, *Zahur Mian's* case, *supra*; *vide* also *Maya v. Sib*, 20 P.R. 1901; *Sayed v. Bungadi*, 88 P.R. 1891; *Nanha v. Sunda*, A.I.R. 1923 Lah. 597; 71 I.C. 840; *vide* also the cases cited under the previous paragraphs. There is little difference between an Appellate Court passing a provisional decree allowing production of a succession certificate

within a fixed time and suspending the passing of the decree

Certificate when may till production of the certificate. Therefore, the appellate Court be filed before Appel- late Court, can proceed in either of these two ways, *Maung Po Htoo v. Ma Ngere*, 1037 Rang. L.R. 396—A.I.R. 1937 Rang. 470.

Succession certificate may be filed before the appellate Court:—When a suit failed by reason of the non-production of the certificate in the trial Court, it may be filed in the Appellate Court on the appellant paying the costs of the previous proceeding; *Ghulan Singh v. Madho Singh*, 19 C.W.N. 794: 28 I.C. 888; *Muralidhar v. Mohini Mohan*, 19 C.W.N. 794 (note): 80 I.C. 510; *Zahur Mian v. Puran Singh*, A.I.R. 1924 Pat. 525: 5 Pat. L.T. 504: 78 I.C. 307. See however *Kasupuri Das v. Makkhu*, 49 All. 1—A.I.R. 1927 All. 227—96 I.C. 478—following 16 All. 259 (F.B.), in which it has been held that retrospective effect cannot be given to a certificate filed at the appellate stage. In a later case, the Allahabad Court accepted a certificate at the appellate

stage, as the objection on the ground of non-production of the certificate was taken for the first time in appeal, *Bhudat Singh v. Mangal Bai*, 1934 A.L.J. 579 = A.I.R. 1934 All. 296 = 147 I.C. 1168.

No Obligation to pay debt where no Certificate or Probate:—A debtor is under no obligation to pay the debt to a representative of the deceased creditor who is not armed with a succession certificate or a probate or is not otherwise clothed with authority to collect debts due to the deceased. *Thakur Das v. Firm of Bashi Mal*, 64 I.C. 385, the reason being that he will have no protection for himself in absence of such a certificate. *Vids notes* at p. 382 under the heading "Object of the Certificate"; also compare *Gokarnath v. Oraddock*, 72 P.R. 1903: 164 P.L.R. 1903.

No Court shall pass a decree &c.:—Note the *imperative* character of the section indicated by the word "shall". No decree can be made for recovery of a debt due to a deceased person unless the representative character of the plaintiff is established hereunder, *vids notes* at p. 382, ante. This section

Certifies necessary applies to the case of a person who has been substituted for a substituted party as plaintiff for one who has died *pendente lite* in a suit in the place of plaintiff for recovery of money due on a bond, and production of a certificate is imperative even in such a case, *Nepuri Bewa v. Nasiruddin*, 27 C.L.J. 400: 45 I.C. 730, following *Sahadev Sukul v. Sakhawat Hossain*, 7 C.L.J. 658: 12 C.W.N. 145; see also *Abdul Sattar v. Satyabhusan*, 35 Cal. 767; *Vasques v. Praggi*, 16 Bom. 519; *Abdul Majid v. Sham erali Fakruddin*, 1 L.R. (1940) Bom. 514 = 42 Bom. L.R. 521 = A.I.R. 1940 Bom. 285 = 190 I.C. 359. Where a decree-holder dies during the pendency of his execution application, the same cannot be carried on by his substituted heirs without production of a succession certificate as the case falls within the wordings of Cl. (b) of section. 214 (1) of the Act, *Tejraj v. Rampyari*, I.L.R. (1940) Nag 198 = 1938 N.L.J. 99 = A.I.R. 1938 Nag. 628. This

The section simply prohibits the passing of a decree or the execution of such a decree, and not the entertainment of a plaint or an application; see *Shivaram v. Sheikh Aldalla* (1884) P.J. 218; *Shivaram v. Ganu*, (1885) P.J. 67; *Yado v. Anandran*, 6 C.P. L.R. 157' *Re Ram Das*, 10 Bom. 107; *Lachmi v. Ganu*, 4 All. 466; *Harsilal v. Hardeo*, 5 All. 212; *Kundon v. Makhni*, 27 P.R. 1894; *Sobha Singh v. Fratha*, 54 P.R. 1898; *Chinna Maricayar v. Avva Nachiar*, (1926) M.W.N. 627 = 99 I.C. 219; *Shantaram Vithal v. S. antaram Bhagwan*, 40 Bom. L.R. 964 = A.I.R. 1938 Bom 451 = 178 I.C. 423; nor the making of an Order. So, it has been held that no succession certificate is necessary for leave to sue for recovery of assets in *forma pauperis*, *Kammathie v. Mangarpa*, 16 Mad. 454. *Vids notes* under the heading "Time for production of Certificate" at p. 385, ante.

Execution of Decree. A Court must not grant execution without production of a certificate, *Mangal Khan v. Salimulla*, 16 All. 26. So, where an heir to a deceased person applies to execute a decree obtained by the deceased, he will have to produce a succession certificate as required by cl. (b) of the section, *Kalyani Prasad v. Mahadev Roy*, 22 Pat. L.T. 945-197 I.C. 461; see also *Bhagwan Manaji v. Hiraji Premaji*, 34 Bom. L.R. 1112-A.I.R. 1932 Bom. 616-140 I.C. 519; *Jadaobai v. Puranmal*, I.L.R. (1944) Nag. 882-1944 N.L.J. 179-A.I.R. 1944 Nag. 243 (case of a widow succeeding under sec. 3 of Hindu Women's Right to Property Act). Comp. I.L.R. (1956) T.O. 37-A.I.R. 1956 Trav. Co. 189. (1956) 2 Mad. L.J. 114; 1955 Andhra W.R. 71; read also *Accountant-General v. Singumathu*, A.I.R. 1961 Mad. 288; I.L.R. (1957) Punj. 284. For production of certificate at the time of an order for sale in execution, *Kallian Singh v. Ram Charan*, 18 All. 34. The principle of 27 U.L.J. 400 does not apply to execution proceedings, so that if the decree-holder dies during the execution proceedings, his representatives need not take out succession certificate for being substituted in his place, *Kshetra Mohan v. Azizulla*, 67 I.C. 902 (Cal). This section applies only to the institution of an execution proceeding and not to the continuance thereof by the decree-holder's heirs. Where an execution proceeding has already been started by the original decree-holder, his heirs, after his death, can continue the same without the production of a succession certificate, *Balmukand v. Gobind Ram*, A.I.R. 1936 Pesh. 17-161 I.C. 204. But see *Ramji Ladha v. Harisangji*, A.I.R. 1955 Kutch. 6.

N. B.:—Production of any of the five kinds of grants specified in sub-clauses (i), (ii), (iii), (iv) or (v), will do. Note that these clauses are connected by the word OR.

Post-office Savings Bank Deposit:—If a depositor dies and probate of his will or letters of administration of his estate or a certificate granted under the Succession Certificate Act, 1889, is not within three months of the death of the depositor produced to the Secretary of the Government Savings Bank in which the deposit is, then—

- (a) If the deposit does not exceed three thousand rupees, the Secretary may pay the same to any person appearing to him to be entitled to receive it or to administer the estate of the deceased, or
- (b) if the deposit does not exceed one hundred rupees, any officer employed in the management of a Government Savings Bank, who is empowered in this behalf by a general order or special order of the Governor-General in Council, may subject to any general or special orders of the Secretary in this behalf, pay the deposit to any person appearing to him to be entitled to receive it or to administer the estate.—*vide Section 4 of*

Government Savings Bank Act (V of 1873), as amended by Act XVI of 1928. For the definition of the word "Secretary," *vide* Sec. 8 of the said Act. *N.B.*—The above rules have been extended to five years' Cash Certificates, *vide* Post Office Cash Certificates Act, 1917. *Vide* also the rules in the appendix under the heading "Post Office Savings Bank Rules."

Member of Army Corps:—Under sec. 115 of the Indian Army Act (VI of 1911) no certificate is necessary for disposal, of property not exceeding Rs. 1,000 belonging to a deceased soldier, to his representative.

Curator:—No certificate is necessary for a curator appointed under sec. 195, *supra*, *Baba Sab v. Nursappa*, 20 Bom. 437, the reason being he does not claim on succession.

Receiver:—He comes in by virtue of his appointment, and not as a representative of the deceased, so no certificate is necessary for him, *Harihar v. Harendra*, 87 Cal. 754 : 12 C.L.J. 252 : 6 I.C. 416; but see *Ponuchabai v. Lekhraj*, 3 S.L.R. 118. He does not claim on succession and therefore this section is not applicable to him, *Ramaswami Iyengar v. Doraisami Vandayar*, I.L.R. (1942) Mad. 661—(1942) 2 M.L.J. 748—A.I.R. 1943 Mad. 210—206 I.C. 412.

Common Manager:—A common manager, appointed under sec. 95 of the B.T. Act, holds a position very much similar to that of a receiver, *Benimadhab v. Upendra Chandra*, 24 C.W.N. 198 : 30 C.L.J. 279. Therefore, no certificate etc. are necessary for him, he not claiming on succession, *Kshitish v. Osmand Bibi*, 39 Cal. 587 : 16 C.W.N. 516 ; Cf. *Naba Kishore v. Atul*, 40 Cal. 150.

Trustee:—Where one trustee is succeeded by another this section does not apply, as there is no question of "being entitled to the effects" etc., *Srimant Raja Yarlogadda v. Makerla*, 20 Mad. 162 : 1 C.W.N. 497, P.C. Of. *Malikarjuna v. Sridevamma*, 20 Mad. 162.

Mohunt of a Muth:—For the very same reason, where one mohunt dies, and another mohunt steps in his place, no certificate etc. will be necessary for collection of debts or for execution of decrees. *Re Bhairab Bhastee*, 24 W.R. 340; *Jogendra v. Ram Chandra*, 20 Cal. 103.

Succession certificate when necessary:—A succession certificate is necessary in every case of debt where the claim is founded on succession. For cases exempted from this section on the ground of survivorship, *vide* under the heading, "When succession certificate not necessary," *infra*; as also under the heading, "on succession" at p. 388, *ante*. A person's self-acquired or Self-acquired Property separate property devolves by succession and not by survivor-

ship, therefore, it is subject to a succession certificate, *Virasav v. Srinivasachariar*, 44 Mad. 499 : 40 M.L.J. 481 : (1921) M.W.N. 290 : 20 M.L.T. 294 : 18 L.W. 476 : 62 I.C. 944 (F.B.); *Ghisa v. Ram Ballav*, 13 I.C. 363. Cf. *Sumudra v. Kales Churn*, 13 W.R. 199. Income from an imitable estate accruing during the life time of the last holder is his separate property and passes by succession and not by survivorship. *Maharaja of Jaypore v. Narayan Naidu*, 21 Pat. 849 = A.I.R. 1943 Pat. 107 = 205 I.C. 372. A certificate is necessary for a separate debt, though not for the family debt, *Pateshuri v. Bhagwati*, 17 All., 578; Cf. *Raghavendra v. Bhima*, 16 Bom. 819 ; *Jagmohan v. Allu Maria*, 19 Bom., 398; *Venkataramana v. Venkayya*, 14 Mad. 377; *Subramania v. Rakka*, 20 Mad. 232 : 7 M.L.J. 100; *Pallamraju v. Bapanna*, 22 Mad. 380 ; Of. 18 W.R. 199. An insurance policy, the premia whereof were paid out of one's own salary will be his separate property within the meaning of this rule, *Bijamma v. Ramkrishna*, 29 Mad 121. A succession certificate or grant from the Probate Court is necessary, and an Insurance Company is justified in demanding it, for the purpose of making payment of money due under a whole life policy, *Gresham Life Insurance Society Ltd. v. Collector of Etawah*, 54 All. 1026 = 1912 A.L.J. 1015 = A.I.R. 1933 All. 1 = 143 I.C. 343. This is particularly so, when the policy is for a definite sum, *Mohar Singh v. Reet Kaur*, A.I.R. 1942 Pesh. 42 = 201 I.C. 341. A succession certificate is imperatively required in the case of a divided Hindu family, *Grish v. Rumballabh*, 13 I.C. 363. As to the absence of necessity of Succession certificate for a receiver appointed by Court in a litigation subsequent to the demise of the deceased for recovery of dues of the estate read the notes at p. 389, ante.

When Succession Certificate not necessary:—The question of a Succession

Certificate arises only in connection with claims based on Succession; therefore claims based on survivorship are founded on succession, outside the scope of this section, and no certificate is necessary for the same, *Mathuraprasad v. Durgawati*, 36 All., 380 : 12 A.L.J. 525 : 24 I.C. 182. *Ramchandra v. Bapu*, 16 Bom. 240; *Palaniappa v. Avatharaman*, 7 M.L.J. 195; *Samchand v. Bihari*, 1890 P.J. 362; *Kissenlal v. Tilak Chindra*, 49 C.W.N. 1218. Read generally the notes and cases under the heading, "Restriction on grant of Succession Certificate" under sec. 370, post. So, it has been said that in a suit by the survivor of a joint family to

No certificate necessary recover joint family debts, no succession certificate is for a survivor under necessary, *Ramratan v. Subhan*, 12 A.L.J. 672 : 24 I.C. 93; Mitakshara Law.

Gurditta v. Dhari Mal, 31 J.C. 904 (Lab.). Under the Mitakshara Law, a son can maintain a suit for debts owing to his late father without a certificate under this section, *Sital Prasad v. Kafut Sheikh*, 26 C.W.N. 498 : 65 I.C. 367; *Pichai Kutti v. Ranghnadham*, 28 M.L.J. 828 : 17 M.L.T. 264 : 28 I.C. 490; *Varadajulu v. Velnyudha*, 22 L.W. 230 = A.I.R. 1925 Mad. 1160 = 90 I.C. 743 (a case of promissory note). In this case it was further held that "the document sued on is a promissory note could not make any differ-

ence." "It is not necessary that on the face of the document it should appear that the debt belongs to the joint family. In all cases, the question will be whether the moneys sought to be recovered were advanced from joint funds or were the individual earnings of the person in whose favour the document was executed." *Censalal*, however, *Banwarlal v. Maksudan Lal*, 1930 A.L.J. 280 = A.I.R. 1930 All. 99 = 192 I.C. 183. As to whether the joint character of the debt should be apparent on the face of the document or not, see *Venkataramanan v. Venkaya*, 14 Mad. 377; *Vridyanath v. Chinasami*, 17 Mad. 115; *Subramania v. Rakhu*, 20 Mad. 232; 7 M.L.J. 100; *Perayya v. Ahmed Abdul Rakiman*, (1914) M.W.N. 671 = 27 M.L.J. 236 = 1 L.W. 612 = 25 I.C. 206; Cf. *Pera Reddi v. Abdul Hossein*, 1 M.L.J. 679; *Nelu v. Krishna*, 1910 M.W.N. 211 = 8 M.L.T. 85 = 6 I.C. 745; *Pichai Kuttia's case, supra*; *Romnaik v. Subramania*, 28 M.L.J. 372 = 17 M.L.T. 266 = 28 I.C. 688; the mother of a minor coparcener can collect the debts of her son's deceased coparcener without a succession certificate, *Robert v. Gopal*, 2 M.L.T. 246. A decree obtained by one undivided brother can be, after his death, executed by another brother without a certificate, if the decree be a family property.

Raghavendra v. Bhimsa, 16 Bom. 349. The illegitimate son of a Sudra takes his father's property by survivorship and can recover his debts without a certificate, *Cunjal v. Kashiram*, A.I.R. 1923 Nag. 67 = 68 I.C. 417. That is also the position of an

Adopted son. An adopted son in relation to ancestral property, to recover which, therefore, he is not required to produce any certificate, *Ramanathan v. Subramana*, 28 M.L.J. 372 = 17 M.L.T. 266 = 28 I.C. 688; but see *Perayya's case, supra*. For other cases of survivorship not requiring a certificate, see *Sahadev v. Shukhawat Hossein*, 12 C.W.N. 145 = 7 C.L.J. 668; Cf. *Gur Pershad v. Dhersi Ras*, 88 Cal. 182 = 15 C.W.N. 49 = 19 C.L.J. 203 = 7 I.C. 806; *Harihar v. Harendra*, 37 Cal., 764 = 12 C.L.J. 252 = 6 I.C. 416; *Mayaram v. Shobdas*, 20 P.R. 1901; *Syed Mehmed v. Parbati* 18 I.C. 228; also *Vital v. Gotyn*, 1 Bom. L.R. 197 = 81 I.C. 904; *Jagmohan v. Atta Maria*, 19 Bom. 838; *Ram Chandra v. Bapu*, 16 Bom. 240; *Bijraj Bhairo Prasad*, 23 Cal. 912; *Bissanchand v. Chatrapat*, 1 C.W.N. 82; under O. XXX. r. 4, if one of the partners dies *pendente lite*.

Surviving partner. The right of suit in respect of the debts due to the firm survives to the surviving partners, and it is not necessary to bring the legal representatives of the deceased on the record, though they may be so brought; if desired, *Babu Kissen Das v. Kanhya Lal*, 17 C.L.J. 648 = 21 I.C. 509; *Ujar Sen v. Lachmi Chand*, 32 All. 638 = 7 A.L.J. 758 = 6 I.C. 840; and the necessary effect of the application of this rule of survivorship is to do away with production of the certificate; vide *Pulin Behari v. Abdul Majid*, 44 I.C. 911 (Cal.) Cf. *Debidas v. Nirpat*, 20 All. 365; *Motilal v. Ghellubhai*, 17 Bom. 6. But see *Ram Narain v. Ram Chandra*, 18 Cal., 86; *Contra—Gurditta v. Dhuri M.L.* 31 I.C. 904 (Lab.); *Kishori Chand v. Nihal Devi*, 70 P.R. 1904,

Vide also notes on "suit for accounts," *supra*. In the case of joint family partnership business, the position of a surviving partner is much better, and no certificate is necessary for him, *Vaidyanath v. Chinnaswami*, 17 Mad. 108. A certificate is not necessary, where promissory note was renewed in favour of the Karta of a Daybhaga family, *Nilmoni v. Soorendra Nath*, 46 I.C. 648 (Cal.). The legatee of a share in a residuum has no interest in the devised

Heir of residuary Legatee. property until the residuum is determined and his right is only to have the estate property administered and applied

for his benefit when the administration is complete. Till then the residuum does not come into existence and the legatees cannot say that any specific share of the residuum has vested in him. So the relationship of creditor and debtor does not subsist between him and the executor with the result that in the event of his death before the determination of the residuum, his heir will not be called upon to produce a succession certificate for pressing his claim against the executor, the terms of this section not applying to the case, *Secretary of State v. Parijat Debi*, 40 C.W.N. 185 = 1935 O.W.N. 1274 = A.I.R. 1935 P.C. 203 = 159 I.C. 829, P.C. In the

Maintenance Grant. case of a joint maintenance grant to two ladies, with the right of survivorship as between them no question of certificate arises on the death of one lady, *Mathura v. Rukmini*, 17 C.L.J. 87 : 19 I.C. 148 (*vide also* at p. 212). The succession certificate is not necessary for execution by a survivor of two joint decree-

Joint decree-holder. holders, *Rai Jagatpal v. Thakurain*, 10 O.C. 178; *Somi Chand v. Bodhar*, (1890) P.J. 352. Of course, no question of a certificate can possibly arise, where one of two joint creditors, after the death of the other, sues only for recovery of his share of the debt, *Sital v. Mansik*, 18 C.W.N. 509 : 9 C.L.J. 381; but see *Basa v. Amir Bibi*, 73 P.W.R. 1914 : 175 P.L.R. 1914 : 24 I.C. 898. Cf.

Impartible Raj. *Ram Narain v. Ram Chander*, 18 Cal. 80. The rule of survivorship prevailing under the Mitakesha law has been extended to Impartible Raj.* Therefore a person succeeding to an impartible estate is not bound to produce a succession certificate, *Gur Pershad v. Dhoss Rai*, 38 Cal. 182 ; 18 C.L.J. 209 : &c. (*supra*). The Patna High Court also has taken the same view, *Shiva v. Beni*, 1 Pat. 387 : A.I.R. 1922 Pat. 529 : 4 Pat. L.T. 6 ; and held that a decree for cost obtained by a previous holder of an impartible estate forms part of that estate and passes by survivorship and may be executed by the succeeding holder without production of any certificate, *Ram Ranbijaya v. Kesho Prosad*, 19 Pat. L.T. 424 = A.I.R. 1938 Pat. 401 = 175 I.C. 558; *Ram Ranbijaya v. Parmalma-nand*, 19 Pat. L.T. 342 = A.I.R. 1938 Pat. 890 = 176 I.C. 902. But the Madras

*Vide the cases cited at p. 87, ante; also *Durga Prosad v. Durga Konwar*, 5 J.A. 149 : 4 Cal. 190; the *Sivaganga case*, 9 M.I.A. 589; *Naragunty v. Meugama*, 9 M.I.A. 66; the *Ramgarh case*, 17 W.R. 816; *Raja Rupsing v. Bans Baigun*, 11 I.A. 149 : 7 All. 1; *Bynath Prosad v. Tej Bala*, 48 All. 228 : 88 C.L.J. 888 : 40 M.L.J. 389; 25 C.W.N. 564 : 19 A.L.J. 317, P.C.

High Court has held that succession to impenetrable estate is not by survivorship and therefore production of succession certificate is necessary. *Bajah of Kalahasti v. Achigadu*, 80 Mad. 454 : 27 M.L.J. 367. A decree for arrears of rent obtained by the last holder of an impenetrable estate is his personal property and descends by inheritance and not by survivorship with the result that it is subject to the law as to succession certificate. *Maharaja of Jeypore v. Narayana Naudu*, 21 Pat. 849 = A.I.R. 1943 Pat. 107 = 205 I.C. 372.—cited at p. 890, ante. Again, a certificate under this section will not be necessary

No certificate unless the claim is against a debtor of the deceased, vide the claim is against a notes at p. 384, ante. A succession certificate is necessary Debtor of the deceased. for recovery of, and not for discharging, a debt; therefore, no such certificate will be necessary for redemption of a mortgage, *Zafar Ali v. Kanti Prakash*, A.I.R. 1929 All 896 = 119 I.C. 96. No succession certificate is necessary for a claim to a Provident fund money of a

Claim to Provident Fund money. deceased Government servant, inasmuch as the money vests in the nominee immediately upon the death of the depositor, *Subhadrammal v. Kannamal*, (1940) 1 M.L.J. 715 = 1940 M.W.N.

490 = A.I.R. 1940 Mad. 590 The section does not apply Payment of dividend to payment of dividend to a scheduled creditor out of to Scheduled Creditor. the assets of the insolvent estate, because it is only applicable to decrees or orders for the payment of debts, *Omayachi v. Rama-chandria*, 49 Mad. 952 = 51 M.L.J. 349 = (1926) M.W.N. 560 = A.I.R. 1926 Mad. 899 = 97 I.C. 411.

The effect of sec. 3 (2) & (3) of the Hindu Women's rights to Property Act. (XVIII of 1937 as amended by Act 11 of 1938) is a survival of the husband's persona in the widow and the widow does not really inherit and no succession certificate is necessary in a suit on a promissory note by her deceased husband, *Natarajan Chettiar v. Perumal Ammal*, (1942) 2 M.L.J. 668 = (1942) M.W.N. 703 It seems that the last word yet remains to be said on this point.

What is or is not Debt:—The term "Debt" here means a sum of money which is now payable or will become payable in future by reason of a present obligation, *Secretary of State v. Partijat Debi*, 60 Cal. 1135 = 37 C.W.N. 769 = A.I.R. 1933 Cal. 841 = 160 I.C. 168; read *Bancha Ram v. Adyanath*, 36 Cal. 492 = 10 C.L.J. 180 = 13 C.W.N. 996 = 3 I.C. 492 (F. B.); *Tulsi Detya v. Bibhutibhusan*, 41 C.W.N. 985 = A.I.R. 1937 Cal. 423, The claim of a successful appellant for restitution expressed in terms of money, will, therefore, constitute a debt as understood herein. *Chockalingam Chettiar v. Chockalingam Chettiar*, (1942) 1 M.L.J. 467 = 1942 M.W.N. 332 = A.I.R. 1942 Mad. 445 = 205 I.C. 248. "Debt" includes surplus sale proceeds, *Bishnco v. Mongul*, 24 W.R. 203; but does not include the equity of redemption; *Ma Thein May v. Ma*

Than Mya, 5 Bur. L. T. 102 : 15 I.C. 425 ; also *Zafar Ali v. Kanti Prakash Insurance Money*, *supra*. A policy of insurance is not a debt, as it is undetermined, *Charusila v. Jyotish*, 88 I.C. 157 (Cal.). See *Sainivasa Chariar v. Ranga Nayaki*, 3 L.W. 466 : 82 I.C. 991. But the insurance money falling due on the death of the insured is a part of the deceased's estate and is a "debt" due to him within the meaning of this section, *Oriental Government Security L. A. Co. v. Vantedu Ammeraju*, 55 Mad 162 : (1911) I.M.W.N. 276 : 9 M.L.T. 451 : 10 I.C. 263 ; *Tulsi Debya v. Bilhuni Bhusan*, 41 C.W.N. 983 = A.I.R. 1937 Cal. 423 : Or, in other words, an undetermined insurance money is not a debt; whereas, if the insurance policy becomes an ascertained debt in the lifetime of the assured, it falls within the meaning of the section, *Charuila v. Jyotish Chandra*, 88 I.C. 157 (Cal.) ; *Vittal Rao v. Hanuonantha Rao*, 50 Mad. 412 = 52 M.L.J. 171 = 25 L.W. 180 = (1927) M.W.N. 118 = A.I.R. 1927 Mad. 859 = 100 I.C. 484 ; *Gresham Life Insurance Society Ltd. v. Collector of Eawah*, 54 All. 1026 = 1932 A.L.J. 1015 = A.I.R. 1933 All 1 = 143 I.C. 343 ; *Mohar Singh v. Revi Kaur*, A.I.R. 1942 Pesh. 42 = 201 I.C. 341. cited at p. 390, ante. Cf. *Ishani Dasi v. Gopal Chandra*, 20. C.L.J. 44 : 18 C.W.N. 1335 : 25 I.C. 286 ; *Bhikaji v. Dattatraya*, 2 Bom. L.R. 888 ; *Shankar v. Umabai*, 87 Bom., 471 : 15 Bom. L.R. 820 : 19 I.C. 786. If the person named in an insurance policy has not obtained letters of administration or succession certificate, he does not become entitled to payment of the money due under the policy and a judgment-creditor of such person cannot in execution of his decree attach that money in the hand of the Insurance Company ; *Daw Yu v. Sun Life Assurance Co.* A.I.R. 1935 Rang. 211 = 159 I.C. 810. Providend fund is likewise neither a debt, nor a security, *Assam Bengal Ry v. Atul Chandra*, 65 C.L.I. 259 = 41 C.W.N. 524 = A.I.R. 1937 Cal. 314 = 171 I.C. 597 ; *Subhadrammal v. Kannammal*, (1940) 1 M.L.J. 715 = 1940 M.W.N. 490 = A.I.R. 1940 Mad. 590 = 193 I.C. 329. In the F. B. case of *Bancharam v. Adyanath*, 86 Cal. 936 : 18 C.W.N. 966 : 10 O.L.J. 180, Mr. Justice Mookerjee points out that when the amount is not liquidated, it is not a debt accruing due to the estate. This is the governing factor in deciding whether a particular debt is or is not subject to a succession certificate, see *Charussila's case*, *supra*. It does not include mesne profits, *Ruteeramun v. Girijanand*, 5 W.R. 160 ; nor unliquidated Unliquidated Damages. damages ; *Clark v. Ruthanavaloo*, 2 Mad. 296. Thus, a claim for damages for illegal detention of sheep belonging to the deceased will not be a debt requiring a succession certificate, *Subbamma v. Munekha*, 18 Mad., 457 ; 5 M.L.J. 61. For the same reason, this section will not cover a suit for accounts, as the amount of claim is unascertained and does not become a debt till the accounts are adjusted, *Riszeswar v. Durgadas*, 32 Cal. 418 ; that is also the case with partnership accounts, *Sahjie Sahib v. Njordin Sahib*, 22 Mad 182. No certificate is necessary for recovery of a decree for costs, *Khadim v. Aldur*, A.I.R. 1966 All. 675. As to whether the phrase "his debt" in the section would mean the whole of the debt

Whether debt includes a portion of the debt, there was formerly a conflict of opinion. The Allahabad Court held (1) that according to the ordinary canon of interpretation "debt" must necessarily mean the whole debt, and (2) that a contrary view would be opposed to the scheme of the section which is intended for the protection of debtors; and would (3) cause the splitting up of an indivisible liability; (4) and that it would lead to harassment of the debtor by multiplicity of suits on one and the same cause of action, *Ghaffoor Khan v. Kalandari Begam*, 33 All., 327 : 8 A.L.J. 76 : 9 I.C. 127; *Kanhaiyalal v. Chandar*, 7 All., 313. This view accords with the cases which have held that separate certificates cannot be granted to different heirs.

Partial Collection of debts according to their shares for partial collection of debts, *Sitab v. Debi*, 16 All., 51; *Muhammad Ali v. Puttan Bibi*, 10 All.,

129; *Waselun v. Gawhurunnissa*, 10 W.R. 105; *Amirunnisa v. Afiaunnissa*, 12 W.R. 307; 9 B.I.R. 404; *Mussamat Bibi v. Jan Khan*, 19 W.R. 265. [N.B.—The old Succession Act, XXVII of 1860, did not contemplate a division of certificates or a power to collect fractional shares of debts.] The view expressed in *Ghaffoor Khan's* case was followed in *Sughra Begum v. Mohamed Mir Khan*, 43 All., 341: 19 A.L.J. 116: 61 I.C. 6 and was distinguished in *Shadi Jan v. Wares Ali*, 43 All., 493: 19 A.L.J. 423: 64 I.C. 1; *Bismilla Begum v. Tawarsul*, 32 All., 335; 7 A.L.J. 255: 6 I.C. 424; *Beys Chan v. Ganesh Sahoo*, 2 N.W.P. 439. [Cf. *Kishore v. Nihal*, 70 P.R. 1904; *Akkar Khan v. v. Balkissen*, (1901) A.W.N. 125.] In a very recent case the Allahabad High Court has again held that succession certificate cannot be granted for a portion of a debt, *Sakat Mal v. Katori*, 21 A.L.J. 122: 71 I.C. 376; though that High Court once conceded that there might be circumstances to justify the grant of a certificate for a portion of a debt, see *Sharifunnissa v. Massom Ali*, 42 All., 347: 18 A.L.J. 314: 56 I.C. 380. The Madras High Court recognises the impropriety of multiplication of certificates, but maintains that the grant of a certificate for a part of a debt is not *ultra vires* or a nullity, *Srinivasa v. Sundra*, 17 M.L.J. 97. The Calcutta High Court has held that the principle of law which prohibits a multiplicity of suits, is in no way affected by the grant of certificates for fractional shares of a debt and that such certificate can be granted for portion of a debt, *Annaurna v. Nalini Molian*, 42 Cal., 10: 18 C.W.N. 886: 23 I.C. 556; *Mohamed Abdul v. Sharifan*, 16 C.W.N. 281: 15 C.L.J. 384: 12 I.C. 593; vide also *Bassa v. Amir Bili* 175 P.L.R. 1914: 73 P.W.R. 1914: 24 I.C. 893. The Calcutta view is equitable in this sense that inability to pay death duty on a heavy debt ought not to stand in the way of recovery of a part of the debt for which the claimant can possibly pay the requisite duty. The Legislature has now clarified the law by inserting a new sub-sec. (3) in sec. 372, post, in conformity with the Calcutta view. A debt being a sum of money payable at present or in future by reason of a present obligation, (p. 893, ante) a succession certificate would be necessary for recovery of a debt which was in existence during the life time of the deceased but which became payable only after his death, *Bancha Ram v. Adyanath*, 86 Cal. 492: 18

G.W.N. 996 : 10 C.L.J. 180 : 8 I.C. 492 (F.B.) ; also *Nepusi Bewa v. Nasiruddin*, 27 C.L.J. 400 : 45 I.C. 780 ; *Secretary of State v. Parijat Debi*, 60 Cal. 1185 = 37 O.W.N. 769 = A.I.R. 1933 Cal. 841. But compare *Boo Beenhan v. Rahin bhat*, 1896 P.J. 713 ; *Ranchoddas v. Bhagubhai*, 18 Bom., 394. Interest is a part of the debt, and a succession certificate is necessary for realisation of interest accruing before the death of the deceased, *Baldev v. Peoples Bank of Northern India, Ltd.* A.I.R. 1938 Pesh. 1 = 173 I.C. 58. A succession certificate is necessary for the recovery of arrears of rent in respect of homestead land not being for agricultural purposes, *Sheikh Shuhbejan v. Sheikh Abdul Jalil*, 41 I.C. 84 (Cal.), vide sub-sec. (2), infra. Cf. *Abinas Chandra Pal v. Probodh Chandra Pal*, 15 C.W.N. 1018 : If, however, such rent accrued due for a period subsequent to the death of the deceased owner, no succession certificate will be necessary, *Brayendra Sundar v. Niladri Nath*, 67 Cal. 814 = 50 C.L.J. 289 = 38 C.W.N. 1177 = A.I.R. 1919 Cal. 661 = 120 I.C. 241 (F.B.) ; Cf. A.I.R. 1956 Bom. 102. The same principle would apply in respect of compensation money payable in respect of deceased's estate acquired since his death Comp. *Ibid.* A decree for enforcement of a mortgage right, as against the mortgaged property is not a decree for debt. Thus, a suit Mortgage suit,

for foreclosure of a mortgage is not one for payment of debt, and therefore no succession certificate is necessary, *Ammuna v. Gurumurthi*, 16 Mad. 64 : 2 M.L.J. 155 ; *Hanuman Baksh v. Dur Raj*, 60 I.O. 271 (Oudh) ; *Umesh Chandra v. Mathura*, 28 Cal. 246 : 6 C.W.N. 607 ; *Hanwant v. Mittra Na*, 1900 A.W.N. 94. A mortgage is more than a mere debt ; and in a mortgage suit the relief claimed relates to some immoveable property. Therefore, even where the decree is only for sale of the mortgaged property, it will not be a decree for a debt within the meaning of this section. *Baidnath v. Shambanand*, 22 Cal. 143 ; *Mahomed Yusuf v. Abdar Rahim*, 26 Cal. 639 : 4 C.W.N. 558 ; *Fakir v. Gisborne Co.* 8 C.W.N. 174 ; *Kanchan v. Birj Nath*, 19 Cal. 386 ; *Raghunath v. Purushnath*, 15 Cal. 54 ; *Surwan Hossein v. Shahazada Golam Mahomed*, 9 W.R. 170 (F. B.) ; *Nandcahnd v. Yenawa*, 28 Bom., 680 : 6 Bom. L.R. 582 ; *Subramanian v. Rakka*, 20 Mad. 382 ; *Palan v. Veramannal*, 29 Mad. 77 ; *Ramu Singh v. Aghori Singh*, A.I.R. 1938 Pat. 68 = 173 I.C. 487 ; *Basudevanand v. Raghbir*, A.I.R. 1955 Pat. 284 ; A.I.R. 1957 Pat. 495 ; (1962) 2 Andhra. W.R. 199 ; *Ramji Ladha v. Harisangji*, A.I.R. 1955 Kutch, 6 (case of chit tham mortgage) ; *Kambali v. Sankarammal*, (1912) M.W.N. 1115 : 12 M.L.T. 202 : 16 I.C. 224 ; *Kiron Bala v. Aul Kristo*, 45 C.W.N. 628. *Saw Chong v. Hafiz Bibi*, 12 Rang. 690 = A.I.R. 1934 Rang. 369 = 153 I.C. 375. Read also the notes under secs. 370 and 381, and consult *Ramu Singh v. Aghori Singh*, A.I.R. 1938 Pat. 68 = 173 I.C. 487, *supra*. An equity of redemption, as said above, is not equivalent to a debt, *M. Thein May v. Ma Than Mya*, 5 Bur. L.T. 102 = 15 I.C. 426, *supra*. The English law is also to the same effect, *Badeley v. Consolidated Bank*, 38 Ch. D. 238. For the position of a redemption suit, vide notes at p. 398, ante. No certificate is necessary in case of a usufructuary mortgage, *Umesh Chandra v. Mathura Mohan*, 28 Cal. 246, (*supra*) ; see *Arumugam Pillai v. Valma Koundan*, 24 Mad., 22. But

the Allahabad High Court makes a distinction between a simple mortgage and other mortgages and between a decree for sale only and a decree for foreclosure, and holds that where the decree is for recovery of money by sale of the mortgaged properties, mortgagee's heirs will have to produce a succession certificate, *vide Fakih Chand v. M. Shammad*, 16 A.I.R. 259 (F.B.)—followed in *Kasumari Das v. Makku*, 49 All., 1 = A.I.R. 1927 All. 227 = 96 I.C. 478. Also *Aemat v. Silla*, 9 A.L.J. 766 : 16 I.C. 108; *Ramsarup v. Kalla*, 14 I.C. 570; *Mohammad Ibrahim v. Bhagwan Das*, A.I.R. 1935 All. 897 = 158 I.C. 85; but this Allahabad view is open to criticism.

vide Ghose's Mortgage, p. 68. A decree for the enforcement of a personal decree or further decree under O. XXXIV, r. 6. of a charge against the charged property is not a decree for a "debt" as understood here. *Ruprao v. Ramrao*, I. L. R. (1952) Nag. 189 = A.I.R. 1952 Nag. 68. A succession certificate is however necessary for a personal decree under O. xxxiv. r. 6, C.P. Code, 1908; *Sahadeb v. Sukhwat Hossein*, 7 C.L.J. 658 : 12 C.W.N. 145; *Abdul Sattar v. Satyalhusan*, 35 Cal. 767; *Naimchand v. Yenunda*, 28 Bom. 630 : 6 Bom. L. R. 582; *Kanchan Modi v. Brinj Nath*, 19 Cal. 536; *Kamlali Naidu v. Sunkaram*, (1912) M.W.N. 1115 : 12 M.L.T. 202 : 16 I.C. 224. When the personal remedy becomes time-barred, no question of succession certificate arises, *Mohammad Ibrahim v. Bhagwan Das*, A.I.R. 1935 All. 897 = 158 I.C. 885. A judgment-debt created by the decree itself (e.g. a decree for costs) is not a debt so as to require a succession certificate, *Tarak Das v. Dower-debt*.

Batta Krishna, 67 C.W.N. 601. The DOWER of a Mahomedan wife, whether prompt or deferred, is a debt, and a succession certificate is necessary for its recovery, *Ghaffer Khan v. Kalanduri*, *suffra*; see also *Abdul Karim v. Mubbulunnesa*, 30 All. 315 : 5 A.L.J. 598 : 1908 A.W.N. 118; *Sayad Ahmed v. Bunyadi Begum*, 88 P.R. 1891; *Jyani Begum v. Umarao Begum*, 32 Bom. 612 : 10 Bom. L.R. 764. Cf. *Shadijan v. Waris Ali*, 48 All., 493 = 19 A.L.J. 423 : 64 I.C. 1. Money deposited by employee with employer as security for good conduct, becomes, upon death of the employee, a debt due from the employer, and a succession certificate will be necessary for its recovery. *Ram Rau v. Bachia Kuart*, 20 Pat. L.T. 777 = A.I.R. 1939 Pat. 688 = 185 I.C. 836.

Assignment of Debt:—An assignee of a debt due to the estate of a deceased person must take out succession certificate in order to sue the debtor. Such a certificate may be produced even in second appeal, *Kariparam v. Nagindas*, 1893 P.J. 35; *Lal Chand v. Nanda Lal*, 37 P.R. 1693. *Karuppasamy v. Picku*, 15 Mad 419 ; 2 M.L.J. 116. An assignee from a person who has obtained a Succession Certificate is entitled to sue and obtain decree for the recovery of a debt due to the estate of the deceased without producing a Succession Certificate in his own name, *Aruna Challa v. Muthu*, 42 Mad. 180 : 35 M.L.J. 666 : 48 I.C. 736 but see *Allahabad Khan v. Soni Ram*, 35 All., 74 : 17 I.C. 486 (not generally approved of). When a Succession Certificate was obtained in respect of debt and sub-

sequently the debt was assigned to a third person to whom the Succession Certificate was also handed over, the assignment of the debt is valid and the assignee is entitled to sue for the recovery of the debt; *Ram Lal v. Annu Lal*, 86 All. 21: 11 A.L.J. 968: 22 I.C. 349, *Goswami v. Haridas*, 18 All. 474: 14 A.L.J. 677: 34 I.C. 364. See *Shodhne Mahaldaar v. Halal Khore*, 4 Cal. 645: 3 C.L.R. 462. Where no certificate has been obtained by the assignor, an assignee is entitled to a certificate, *Radhica v. Secretary of State*, 88 All. 488: 14 A.L.J. 650: 35 I.C. 711; Cf. *Mancharam v. Bai Mahali*, 18 Bom., 315: *Ram Chariter v. Ram Narain*, 2 P.L.J. 350: 40 I.C. 96. A succession certificate will be necessary even for an assignee of an undivided son, *Anmasi Kuttu v. Apain*, 29, I.C. 284. The reason for obliging the assignee from the heir of a deceased owner to take and produce a succession certificate, is that if the law were otherwise, the provisions of this section would be easily evaded and the protection afforded to the debtor would be illusory, *Vairavan v. Srinivasa*, 44 Mad. 499: 40 M.L.J. 481: (1921) M.W.N. 290: 13 L.W. 475: 62 I.C. 944 (F.B.); *Guilsham Ali v. Zahir Ali*, 42 All. 549: 18 A.L.J. 666: 57 I.C. 56. But there is no reason for such apprehension when the certificate has already been taken by the assignor. The section requires only the production of a certificate and not a certificate in the name of the person suing; therefore, it is immaterial whether the assignee or the assignor takes the certificate. Cf. *Aruna Challa v. Muthu*, *supra*. As to the applicability of the section in the case of assignment of decree, see *Chardhury M. Nazmul Hossan v. Abdul Wahab*, 1925 P.H.C.C. 228-7 Pat. L.T. 27=A.I.R. 1926 Pat. 591.

Decree obtained without a Certificate—if nullity:—The language of the section is so imperative that it seems, that contravention of the provisions hereof will go to the root of the whole thing and affect the question of the Court's jurisdiction. Besides the representative character of the plaintiff is not established till the necessary grant is obtained and in making a decree in the absence of a grant, the Court may decree the suit in favour of a wrong person affording no relief or discharge to the judgment-debtor. That is how the question of absence of jurisdiction comes in nullifying *ab initio* the decree made. If the Court has no jurisdiction in respect of the judgment-debtor's person, the Executing Court—if decree will be a nullity and then even the executing Court can refuse execution on the ground that it was made without certificate; can refuse to execute it on the ground that it was made without jurisdiction, *Gora Chandra Halder v. Profulla Kumar Roy*, 42 C.L.J. 1: 29 C.W.N. 948: A.I.R. 1925 Cal. 607: 89 I.C. 686 (F.B.). But the judicial opinion expressed in *Tika Bai v. Godha Ram*, 145 F.L.R. 1905, is otherwise. According to it, a decree is not a nullity from want of a certificate and the executing Court is not competent to question the validity of such a decree. The view of the Bombay High Court is to the same effect. That Court has ruled that the omission to obtain a succession certificate is a good ground of appeal, but if a decree has been passed and is not appealed from, it remains a valid decree and cannot be regarded as a nullity for want of a succession certificate, *Abdul Majid v.*

Shamsheali Fakruddin, I.L.R. (1940) Bom. 514 = 42 Bom. L. R. 521 = A. I. R. 1940 Bom. 285 = 190 I.C. 869. The Patna Court also has opined that the certificate only serves as evidence for a certain purpose and the decree made without its production is not void and the executing Court will be bound to execute it as it is. *Ramkinkar Sinha v. Mohammad Ismail Choudhury*, 16 Pat. L. T. 99 = A.I.R. 1985 Pat. 148 = 157 I.C. 81. Comp. A.I.R. 1960 Pat. 182.

Proof of Representative Title:—Representative Title under this section can be proved by any of the following things (1) Probate or Letters of administration, or (2) certificate under sec. 31 or 32 of the Administrator General's Act, or (3) a succession certificate under this Act (Part X), or (4) a certificate already granted under the Repealed Act, VII of 1889, or (5) a certificate granted under Bombay Regulation No. VIII of 1827. Any one of these five things will do, as they are in the alternative as indicated by the word OR. *Vide* at pp. 382 & 388, ante. Cf. *Ramanugrah v. Ohuni Lal*, 27 I.C. 822, in which it has been held that a person who has obtained grant of probate or letters of administration is not required to obtain a succession certificate for the purpose of maintaining a suit. Comp. *Raman v. Chaldean*, I.L.R. (1959) Ker 832 = A.I.R. 1960 Ker, 84. The Scheme of the Act is not to grant a probate which can be limited to the collection of debts. *Sunitra Bai v. Visheshwar*, I.L.R. (1946) Bom. 106 = 47 Bom. L.R. 980 = A.I.R. 1946 Bom. 109 = 228 I.C. 321. Absence of proof of representative character cannot be made good with retrospective effect by subsequent curative process, I.L.R. (1951) Assam, 51 = A.I.R. 1951 Assam, 142.

Probate granted by a Native Court:—Such a probate does not come within the meaning of clause (i); therefore, the grantees of such a probate must take out fresh grant from a Court in British India. *Manasing v. Amad Kunhi*, 17 Mad., 14.

When Succession Certificate can or can not be issued:—The certificate can not be issued when there is no debt due; *Subbanna v. Munnska*, 18 Mad. 457. Cf. *Sakat Mull v. Katori*, 21 A.L.J. 122 : A.I.R. 1928 All. 265 : 71 I.C. 376. No certificate can be issued unless the claim is on succession, *vide* at p. 383, ante. A succession certificate ought not to be refused on the ground that a regular suit involving the question of succession is pending, *Bassa v. Amira Bibi*, 175 P.L.R. 1914 : 78 P.W.R. 1914 : 24 I.C. 893. Under section 370, post, a succession certificate shall not be granted with respect to any debt or security, right to which is established under sec. 212 or sec. 213 by means of Letters of Administration or Probate.

Who is entitled to a Certificate:—A person entitled to inherit the deceased's property and to collect his debts is entitled to a certificate. *Jokna v. Bhagwani*, 3 N.W.R. 820; *Dukhoram v. Luchme*, 4 Cal. 954 : 4 C.L.R. 49; Cf. *Kooyathi v. Koyammal*, 81 I.C. 446 (Mad.). For this reason a childless widowed daughter is not entitled to a certificate, *Vide*, 48 All. 450 : 19 A.L.J. 272. So is the case with

the sister's daughter's son, *Krishnapada v. Secretary of State*, 85 Cal. 681 : 7 C.L.J. 555. For FULL SISTER'S SON, *Lal Mahomed v. Buzbool Hossein*, 17 W.R. 862; For FATHER'S BROTHER'S SON, *Gopal v. Haridas*, 11 Cal 348. For the reversioner's position, see *Abinash Chandra v. Probodh Chandra*, 15 C.W.N. 1018; 10 I.C. 837. In case of several applicants the person having the largest interest will be entitled to the certificate, *Abdool Ali v. Abidunnissa*, 4 W. R. (1864) Mis. 41; *Azeem Khan v. Ameerun*, 12 W.R. 36. A purchase at an auction sale of a debt due to the deceased is entitled to a certificate, *Mancharam v. Bai Mahali*, 18 Bom. 315; *Kirparam v. Nagindas*, 1993 P.J. 55.

Court's duty to determine the person entitled to Certificate:—*Vida Oheed Khan v. Collector of Shahabad*, 9 W.R. 502; but it is not bound to determine intricate questions of law or fact for that purpose, *Surferji v. Kamakshamba*, 7 Mad. 452. As to what the Court ought or ought not to consider, see *Re Odday Churn*, 4 Cal. 411.

Res.Judicata:—The principles of *res judicata* do not apply to this section *Bharilal v. Majid Ali*, 24 All., 138. The dismissal of a suit for non-production of a succession certificate does not operate as *res judicata*. *Pethaperumal Chetti v. Murugamdi*, 18 Mad., 466; 5 M.L.J. 189.

Sub.sec. (2): Rent :—In sub-sec. (1), the word "debt" does not include rent, revenue or profits payable in respect of land used for agricultural purposes, see *Nagendranath v. Saladallashini*, 26 Cal., 536; 3 C.W.N. 294; *Mokshoda v. Nanda*, 27 Cal., 556; 4 C.W.N. 669; *Kissen Lal v. Tilak Chandra*, 43 C.W.N. 1218; *Andalammal v. Venkata Charlu*, 17 M.L.J. 257; see also *Ranachordas v Bhagubhai*, 18 Bom. 894. The profits of zemindari property are excluded under this sub-section, and therefore no certificate is necessary for their recovery, *An lad v. Tajammal*, 1900 A.W.N. 96; Comp. A.I.R. 1956 Madh B 36. The rent for non-agricultural land is not exempted hereunder, and therefore it falls within the meaning of "debt," *Abinash v. Probodh*, 15 C.W.N. 1018; 10 I.C. 837. For this reason, a certificate is necessary for the rent of homestead land, *Sheikh Shahabjan v. Sheikh Abul Jalil*, 41 I.C. 84 (Cal.). A decree for rent not for agricultural land is a debt within the meaning of this section and therefore a succession certificate will be necessary for execution of such a decree, *Hari Chand v. Tara Chand*, A.I.R. 1949 Pesh. 42-208 I.C. 137. The rent payable under a lease for growing lac on certain trees without any right in the land is not rent payable in respect of land within the meaning of this sub-section, *Maharaja of Jeypore v. Narayana Naidu*, 21 Pat. 849-A.I.R. 1949 Pat. 107-205 I.C. 372. The words "land used for agricultural purposes" govern the words "rent, revenue or profits" that precede them, 41 I.C. 84 (Cal.), *supra*. The amount of a decree for rent deposited by the tenant judgment-debtor or is rent even after the death of the decree-holder and his heir is entitled to withdraw the money from Court without producing a succession certificate, *Sureshkrishna*

v. Upendranath, 18 I.C. 495 (Cal.). But bond executed in lieu of rent is not rent, but Paddy Rent. is a debt. *Zemindar of Kalahasti v. Venkatappa*, 1 M.L.J. 680.

Paddy rent is not debt; therefore no certificate is necessary for its recovery. *Ma Hla Kya v. Maung Nyun*, 2 Bur. L.J. 45 : 75 I.C. 287 : A.I.R. 1924 Rang. 139 (1). When the mortgagee leases back the property to the mortgagor in consideration of an annual payment the money so paid on account of the lease is rent in relations to which no question of a succession certificate can possibly arise, *Mahammad Fazal v. Salahuddin Ahmad*, A.I.R. 1937 Pat. 617. Remember that rent not accruing due during the life time of the deceased, is not within this section, *State v. Devassy*, A.I.R. 1946 Trav. Co. 215.

215. [Pro. S. 152 & Suc. Cert. S. 21] (1) A grant of probate

Effect on certificate of
subsequent probate or
letters of administration or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or under the Succession Certificate Act, 1889, or Bombay Regulation No. VIII of 1827 in respect of any debts or securities included in the estate.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding :

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

"This clause is intended to reproduce the effect of sec. 152 of the Probate and Administration Act and sec. 21 of the Succession Certificate Act and appears to come in appropriately under this Part of the Bill since it deals with the substitution of the title of the grantees for that of the certificate holder."

"With reference to the Part of the Bill it will be observed that the arrangement of the clauses brings out very clearly the anomalous position in the Indian law with regard to the requirements of proof of representative title to the property of a deceased person."—*Notes on Clauses of the Original Bill*,

Supersession of Succession certificate by Probate or Letters of Administration : A grant of probate or letters of administration will have the effect of superseding a

previous Succession Certificate under this Act (Part X) or under the repealed Succession Certificate Act (VII of 1889) or under Bombay Regulation No. VIII of 1827, see Sub-sec. (1); and a person to whom a probate (or letters of administration) is granted will be entitled to be substituted in the place of the Certificate-holder in all pending litigations, see sub-sec. (2).

Certificate under the Bombay Regulation :—An administrator appointed under sec. 10 of this Regulation, does not, by such appointment, become the legal representative of the deceased, and therefore is not entitled to continue an appeal by such deceased, *Malapa v. Devi*, 21 Bom. 102. But see *Mir Ibrahim v. Lialnissa*, 12 Bom., 150, where it was held that so long as an appointment under sec. 9 of the Regulation lasts, no one else can represent the estate.

Proviso :—Notwithstanding the supersession of the Succession Certificate by the grant of probate or letters of administration under sub-sec. (1), a debtor will be entitled to get discharge for all payments made by him to the Certificate-holder in ignorance of such supersession. This proviso will not give protection to such a debtor unless he was ignorant of such supersession.

216. [Suc. S. 260 & Pro. S. 82] After any grant of probate or letters of administration, no other than the Grantee of probate or administration alone to person to whom the same may have been granted sue, etc., until same shall have power to sue or prosecute any suit, revoked. or otherwise act as representative of the deceased, throughout the State in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

N. B.—Compare this section with sec. 75 of the English Probate Act.

Grantee of Probate or administration alone to represent the Estate, in Litigation or elsewhere :—After the grant of Probate or Letters of Administration, only the grantee thereof is entitled to carry on the litigations concerning the deceased's estate or otherwise act as the deceased's representative: See *Sankti v. Ramkishun*, 55 I.C. 504 (Pat.); *Chidambara v. Krishnaswami*, 39 Mad. 365: 28 M.L.J. 285; *Shaik Kuloo v. Mt. Bibi Ramzo*, 2 Pat. L.T. 805: 60 I.O. 350. No other person is entitled to act on behalf of the estate; thus, it was held that in a suit by a Creditor against the estate of the deceased (dying testate), the estate could not be represented by the deceased's heirs, *Matangini v. Chaconeymoney*, 29 Cal., 903. A rent suit against a minor beneficiary without making the executor a party is bad, *Dhirendra Kanta v. Saradindu*, 9 C.W.N. xci: as to the position of Mahomedans, who are exempted from the operation of sec. 218, *Supra*, in relation to this section, see *Ram Dhan v. Sharfuddin*, 9 Bur. L.T. 236; 34 I.O. 128.

According to the Labour Court, the section does not stand in the way of a legatee entitled to a debt under a will seeking to recover the same by suit instituted with the permission of the executor, *Panna Devi v. Sham Lal*, A.I.R. 1938 Lah. 805—146 I.C. 638.

The section does not say anything as to how long an administration is to last and from this it is not to be inferred that this section lends countenance to the proposition that once an administrator is always an administrator. When the administration is completed and its purposes are fulfilled, the administrator becomes *functus officio*, exactly in the same way as an executor becomes *functus officio* on the completion of the administration ; read the note under sec. 366, *post*.

Administrator's position When an administration is fully completed the legal position when administration is is that the grant of letters of administration virtually ended. stands revoked, even without any formal order by the Court to that effect, *Mst. Kulwanta Rewa v. Karam Chand Soni*, I.L.R. (1989) 1 Cal. 21—68 C.L.J. 8—43 C.W.N. 4—A.I.R. 1938 Cal. 714—173 I.C. 873. As to when an administration terminates, read the notes at p. 370, *ante*.

Grantee to prove his Title :—When the grantee takes action under this section, he is to prove his title. Cf. O. vii., r. 4 ; in order to do so, he must file a certified copy of the grant, and if there is a will, a copy of the will as well, *Delaney v. Rahamat Ali*, 33 Cal. 710.

When this Section does not apply :—This section applies only after grant of probate or administration. So where probate has not been taken out, persons who have taken possession of the estate pending issue of probate may represent the estate for sum purposes, and a decree against such persons is not a nullity, *Dinamoni Chaudhurani v. Elahadut Khan*, 8 C.W.N. 842. Cf. *Prosunna Chunder v. Kristo Chaitunno*, 4 Cal., 342. Where after grant of administration to the widow of the deceased another person already got a decree declaring his right to $\frac{1}{4}$ share as legatee, a subsequent suit by him to recover a fourth share of rent from a tenant is maintainable, *Rajani Kanta v. Makhan Lal*. 16 I.C. 542 (Cal.).

Where there are several executors :—Where several executors are appointed and only one takes out probate ; that does not debar him from acting, *Satyaprosad v. Motilal*, 27 Cal 683 : as a matter of fact only the executor taking out probate is entitled to act ; the others are precluded from dealing in any manner with the estate, *Chidambara v. Krishnaswami*, 89 Mad. 365 : 28 M.L.J. 285 : 2 L.W. 241 : 28 I.C. 221. Cf. *Chunilal v. Osman Bibi*, 80 Cal. 1044. The theory of the vesting of the estate in the executor at the moment of the testator's death even before the will is probated (*Vide* notes at p. 369, *ante*) is true enough for certain purpose, but it is subject to the rule of this section, that is, once a grant is made under this Act, then it is only the grantee alone who can have dealings with the property

and can grant valid discharge in respect of the same, *Akhay Kumar Pal v. Nandalal Das*, I.L.R. (1946) 1 Cal. 482. This section does not impinge on the power of a co-executor under sec. 224, *post*, to come in for a grant on a date subsequent to the grant of a probate to another co-executor on an earlier date; read sec. 224, *post*.

Grantee's Representative has no right :—It is only the grantees of probate or administration that has a right under this section; so the grantee's own representative has no right under this section to maintain a suit after such grantee's death. Cf. *Narasunulla v. Gulam Hossain*, 16 Mad. 71. The effect of this position is that if the heir of the deceased has already collected the rents and profits of the deceased's property, the grantee of probate or administration can sue such an heir for accounts, *Harry Percival v. Administrator-General, Punjab*, 11 Lah. 325—30 Punj. L.R. 503 = A.I.R. 1929 Lah. 763—122 I.O. 467.

Representative :—For meaning of the term, vide *Chatthakelon v. Gobindo*, 17 Mad., 186; *Dinamani Chaudhurani v. Elahadut Khan*, 8 C.W.N. 842; *Mir Ibrahim v. Zialnissa*, 12 Bom., 150; *Nathuram v. Kulthi Haji*, 20 Mad. 446; *Lallu Bhagram v. Tribhuvan*, 13 Bom., 633; *Malapa v. Devi*, 21 Bom. 102. Of. O. vii., r. 4 of the Code of Civil Procedure.

PART IX.

PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED.

"The provisions of the Indian law regarding the grant of probate and administration of the assets of a deceased person are to be found in the Indian Succession Act, 1865, and the Probate and Administration Act. Those sections of the Succession Act which deal with representative title have already been disposed of by the preceding Part of the Bill and with these exceptions the provisions of the two Acts on the subject are with comparatively small differences identical. This Part of the Bill therefore provides in general terms for the administration of the assets of deceased persons of all classes covered by the two Acts in question and provides in its separate clauses such special exceptions which are necessitated in order that the existing law may be reproduced"—*Notes on Clauses (with the Original Bill)*.

217. [Suc. S. 2 & Pro. Ss. 2 and 150] *Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.*

"We have amended the clause to make it clear that it refers to intestate as well as testamentary succession"—*Joint Committee Report.*

Application of Part IX:—*Vide* the Joint Committee Report quoted above. The effect of this section is to make Part IX of universal application unless it can be shown by reference to some provision of this Act or of some other law that it is not so. Compare *Dagree v. Pacotti*, 19 Bom., 15; *Nepenbala v. Sitikantha*, 12 C.L.J. 459 : 15 C.W.N. 168 : 8 I.C. 41. See also *De Souza v. Secretary of State*, 12 B.L.R. 423; *Kalyani Kutty v. Gouri Kutty*, I.L.R. (1958) Trav. Co. 586—A.I.R. 1953 Trav. Co. 352. The Government prerogative of preference in respect of its dues, taxes etc. is saved from the operation of the Act by the reservation, "by any other law etc." in the section, *U Ba Thi v. Administrator-General, Burma*, 1939 Rang. L.R. 701—A.I.R. 1940 Rang. 36—186 I.C. 684.

CHAPTER I.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

"We have re-arranged the provisions in the following order: (1) administration in case of intestacy, (2) Probate, (3) letters of administration"—*Joint Committee Report.*

218. [Pro. S. 23] (1) If the deceased has died intestate To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

Preliminary Points:—

(1) This section exclusively applies to Hindus, Mahomedans, Buddhists, Sikhs, Jainas and exempted persons.

(2) Letters of administration can be granted under this section only in case of intestacy, *Mohim Chandra v. Sarajubala*, 9 C.L.J. 576 : 1 I.C. 140.

(3) The underlying principle of this section is that grant shall follow the interest.*

* Sir Whitley Stokes (Law Member) in his objects and reasons for the Probate Act, 1881, says, "The only rule it seems possible to lay down for these classes is the broad one that the grant shall follow the interest; that, when several persons inheriting portions of the estate claim administration, the Judges may grant it to any one or more of them as he thinks fit, and that when no such person applies be may grant it to a creditor."

(4) The word, "part" shows that a grant hereunder can be made in respect of a part of an estate. Cf. (1955) 1 M.L.J. 542 = A.I.R. 1955 Mad. 411.

Scope of Enquiry:—According to some opinion it is the duty of the Probate Court first to decide whether the deceased left any assets, and if so, whether the applicant is the person, who would be entitled to administration, *Durga Dass v. Radha Raman*, 7 I.C. 1 (Cal.). Cf. *Kalidas's case*, cited under the headings, "Enquiry as to the existence of an Estate" and "Question of Title," *infra*. When ownership or succession to the property of the deceased can be determined only by a regular suit, administration should not be granted, *Man Singh v. Santi*, 50 I.C. 904 (Lah.). For the difference between *succession* and *administration*, see *Re Hasima Latifi*, 63 Bom. L.R. 940 = A.I.R. 1962 Bom. 927. Before granting letters, the Court should see whether there is at all any necessity for administration, *Lakshmi Sundari v. Nityananda Dhupi*, 64 I.C. 61 (Cal.). According to recent opinion, this position may hold good in cases of intestate succession, but in the case of an application for probate or for letters of Administration with a copy of the will annexed, the question is not of much importance, *Durgapada Bera v. Atul Chandra*, 41 C.W.N. 1204 = A.I.R. 1987 Cal. 595. It is also not within the scope of enquiry before a Probate Court whether the will has been superseded by a family arrangement, *Ibid.* Questions relating to the testator's faith, that is, whether he was a Mahomedan or a Christian, his relationship or disposing power etc. are all foreign to an investigation in such a proceeding, *Abdul Rashid v. Minhazul Hasan*, A.I.R. 1938 Nag. 173 = 175 I.C. 637. The Court proceeds on certain assumptions in relation to such matters, *Ibid.* Remember always that a probate is only of the last will; therefore, after probate, other testamentary documents cease to be of any avail, *Teresia v. Lonan Mathew*, I.L.R. (1956) T.C. 188 = A.I.R. 1956 Trav. Co. 186 (F.B.).

According to the Rules for Distribution:—This means that the Courts is to have regard to the mode of succession to which the estate is subject. We have different rules of succession among different sects and subjects, and the Court is to take all these matters into consideration. It is to consider to what sect or what school of law the deceased belonged; whether the estate is a man's estate or a woman's estate; whether there is any special custom in the deceased's community and so forth. Thus, in *Secretary of State v. Jagat Chandra* v. 28 Cal. 608 : 5. C.W.N. 873, the Court granted administration to the preceptor's preceptor of a *Bairagi* (ascetic), as there was a custom to that effect. Administration should be granted to such person who according to the rules for the distribution of estate, would be entitled to the whole or any part of the estate, *Annapurna v. Kattyani*, 21, Cal. 164 ; *Kulidas v. Nritya Gopal*, 14 C.W.N. colli (262) ; *Debendra v. Surendra*, 5 Pat. L.J. 107 : (1920) Pat. 87 : 54 I.C. 807. Cf. *Nityakali v. Kedarnath*, 6 C.L.R. 368. In *Raghunath v. Pate Koer*, 6 C.W.N. 845, administration was granted to a Hindu widow, governed by Mitakshara Law, with respect to her husband's

separate property. Cf. *Lakshmi Sundari v. Nityananda*, 64 I.C. 61 (Cal.); *Re Raghoobar Hazam v. Bahadoor Hazam*, 3 C.W.N. 602xxvii. It is sufficient if the applicant for administration is, according to the rule for distribution of the estate, entitled to the whole or part of the property and alleges that there is property of that nature, and a husband is therefore a proper applicant in regard to his deceased wife's estate, *Nishikant v. Autosh*, 17 C.W.N. 618 : 28 I.C. 206. As for an instance where the Court considered the rules of succession relating to *Stridhan* property, see *Mohun Pershad v. Kishen Kishore*, 21 Cal., 344; *Harilal v. Tripuracharan*, 40 Cal. 650 : 17 C.L.J. 438 : 17 C.W.N. 679 (F.B.). Regard to the rules of distribution should be had even for the purpose of appraising the relative competency between the applicant for grant and the person opposing the grant. Thus, on an application for grant being made by the deceased's wife's brother's daughter, a person related to the deceased through a common ancestor was held entitled to oppose the grant, *Gouri Sankar Chatteraj v. Satyabati Debi*, A.I.R. 1931 Cal. 470 = 193 I.C. 212. Succession to a Hindu convert to Christianity remaining a Christian to the last day of his life will be governed by this Act. *Rimayya v. Josephine Elizabeth*, 44 L.W. 854 = A.I.R. 1937 Mad. 172 = 167 I.C. 488.

His Estate:—The estate contemplated by the section should be the estate of the deceased. The interest of a member of an undivided Hindu family ceases immediately on his death and passes by survivorship to the other members; therefore, the section will be inapplicable to such a case, see *Gopalaswami Pillai v. Meenakshi Ammal*, 7 Rang. 115 = A.I.R. 1929 Rang. 99 = 115 I.C. 905; also read the note under the heading, "Joint Hindu family" at p. 411, *post*.

Prostitute's Estate:—In a proceeding for grant of administration relating to such an estate, Government is a necessary party, see *Harilal v. Tripura Charan*, 40 Cal. 650 : 17 C.W.N. 679 : 17 C.L.J. 438 (F. B.) and the cases cited therein.

Enquiry as to the Validity of Adoption:—Where a claim is put forward on the basis of an adoption under this section, the Court will be justified in inquiring into the validity of the alleged adoption, *Aung Ma v. Ma Ah*, 9 L.B.R. 163 : 11 Bur. L.R. 65 : 45 I.C. 737; *Ma Shan v. Ma Chin*, 10 Bur. L.T. 184 : 44 I.C. 198; *Nga Bassin v. Nga Po*, 38 I.C. 636 (U.B.); *Maung Po v. Maung Kha*, 6 Rang. 897 = A.I.R. 1926 Rang. 225 (F. B.); *Maung Kyaw v. Mao Daung*, A.I.R. 1934 Rang. 205 = 163 I.C. 188; for such a question in a probate proceeding, see *Mahasunder v. Ram Ratan*, 1 Pat. L.W. 370 : 35 I.C. 416; *Maung Taloke v. Ko Aung Myint*, A.I.R. 1935 Rang. 280 = 158 I.C. 397; *Maung Ba Tu v. Ma Hla Min*, A.I.R. 1936 Rang. 239 = 163 I.C. 677 (both cited at p. 409). As to an instance when the Court was called upon to construe a Muslim will authorising adoption, read *Mahomed*

Azim v. Saiyed Mahomed Saadat Ali, 8 O.W.N. 349 = A.I.R. 1931 Oudh, 177 = 136 I.C. 642.

Enquiry as to the Existence of an Estate:—Though it is not necessary for the Court to decide what assets are likely to come to the hands of the administrator still it is the duty of the Court in granting letters of administration, to consider whether there is any estate whatever to be administered, *Lalit Chandra v. Baikuntha*, 15 C.I.J. 805 : 14 O.W.N. 468 : 5 I.C. 395, distinguishing 6 O.W.N. 345 (*supra*) ; *vide also Kalidass v. Nritya Gopal*, 14 O.W.N. collii. (252) : 7 I.C. 1 ; *Nishikant v. Asutosh*, 17 C.W.N. 618 : 28 I.C. 296. Read the notes under the next heading. In *Durgapada Bera v. Atul Chandra*, 41 O.W.N. 1204 = A.I.R. 1937 Cal. 595, it has been pointed out that in granting letters of administration in the case of intestate succession the question of existence or non-existence of an estate to administer may be a relevant enquiry, but in the case of probate or letters of administration with a copy of the will (that is, in case of testate succession) that question is of no great importance. Comp. also *Adwait Ch. Mondal v. Krishnadhone*, 21 C.W.N. 1129.

Question of Title:—Though an enquiry as to the existence of an estate is pertinent under this section, still such an enquiry should be only of a *prima facie* character ; no elaborate enquiry as to title is necessary. Cf. *Re Roghubar Hazam's case*, *supra* ; *Raghunath v. Pate Koer*, 6 C.W.N. 345 : *Mohun Pershad's case*, *supra*. Cf. *Dengelti v. Gultula*, 4 Bur. L.T. 129 : 12 I.C. 888 (in this case the question of title involving an enquiry into the validity of a marriage was relegated to a regular suit) ; *Ma Tok v. Ma Thu*, 5 L.B.R. 78 : 8 I.C. 719. The Probate Court has got nothing to do with the dispute as to the title of the deceased to the property, *Kalidass v. Nritya Gopal*, 14 O.W.N. 252 (note) : 7 I.C. 1 ; *Nathon v. Nathon*, 7 O.W.N. 373 = A.I.R. 1930 Oudh, 272 = 123 I.C. 220 ; *Bai Parvati Bai v. Raghunath Lakshman*, 42 Bom. L.R. 1063 = A.I.R. 1941 Bom. 60 = 192 I.C. 681. Therefore, a *savet* cannot be sustained on the mere ground that the property in respect of which letters of administration are asked for is a joint family estate, *Bai Parvati Bai v. Raghunath Lakshman*, *supra*. The applicant can demand his appointment as administrator if he shows that he has a *beneficial* interest in the property left by the deceased. It is not necessary to go into complicated questions of title in granting administration. If the application for letters of administration premises existence of the deceased's property, an administration order should be made. Of course, if the Court feels that there is nothing to administer, it need not make any such order, *Radha Mohan v. Jagan Lal*, 1949 A.L.J. 310 = 1949 A.W.R. 369. Read the notes under the last heading. When ownership or succession can be determined only by a regular suit, Letters of Administration should not be granted. *Man Singh v. Santi*, 50 I.C. 984 (Lah.). *Adwait Chandra Mondal v. Krishnadhone*, 21 C.W.N. 1129 ; *Hajira Khatoon v. Mustafa Husein*, 1941 O.W.N. 780 = A.I.R. 1941 Oudh, 474 = 191 I.C. 410. See also *Nishikanta v. Asutosh*, 17 C.W.N. 618, and the

notes at p. 419, post.

Sub-sec. (2) : When several persons apply, the Court has a discretion :—This sub-section gives the Court a discretion if there be rival claimants for administration. *Buddu v. Ram Sarup*, 96 P.L.R. 1917 : 42 I.C. 787. The Court should always prefer a sole administration to a joint administration, [*Re Shapsarjee Framjee*, 5 C.W.N. cxlvii; *Warwick v. Greville*, 1 Phill. 126; also *Annapurna's case, supra*,] and naturally leans towards administration *priori patent* (i.e. to the person who applies first). *Cordex v. Trasler*, 4 Sw. & Tr. 51. In order to induce the Court to make a joint grant, sufficiently strong grounds should be made out, *Re Yeshvantrai Eknath*, 91 Bom. L.R. 999 = A.I.R. 1929 Bom. 397 = 122 I.C. 195. Any how, the Court has a discretion in the matter and is not bound to grant joint letters of administration, *Dinbai Berhamji v. Motiba Burjorje*, 48 Bom. L.R. 770 = A.I.R. 1941 Bom. 356 = 198 I.C. 22. Ordinarily, the Court's discretion would be circumscribed by the rules of succession to which the deceased's estate is subject see *Annapurna v. Kallayani, supra*, but under special circumstances, the Court can exercise the power conferred on it by sec 264, post. Cf. *Esoof Elshabim v. Esoof*, 27 I.C. 748 (Bur.). Where there are rival applicants for letters and the status of one of them is disputed while the other is entitled to a portion of the estate, the proper procedure is to ignore the question of status and grant Letters to the person who is entitled to a part of the estate, *Mathu Daw v. Ma Ngwe*, 16 I.C. 764 (L.B.); Cf. *Shwe Yire v. Ellaon*, 9 L.B.R. 174 : 12 Bur. L.T. 89 : 45 I.C. 995. Where the claim and fitness of the applicant are admitted by the rival claimants it is desirable to issue a grant to the applicant without launching into an enquiry into the status of the rival claimants, *Maung Ba Han v. Maung Tun Yin*, 12 Rang, 629. Comp. A.I.R. 1952 Raj. 167 [position of assignee from heir]. For a case of competition between full sister and an adopted daughter, see *Aung Ma v. Ma Ah*, 9 L.B.R. 169 : 11 Bur. L.T. 65 : 45 I.C. 787. Cf. 2 Pat 261 : 12 I.C. 811. In the case of competition between a step child and an adopted daughter the latter has a preferential right, but if the validity of the adoption is not established, the step-child will get the letters, *Maung Taloke v. Ko Aung Myint*, A.I.R. 1936 Rang. 280 = 168 I.C. 397. In the case of competition between two adopted sons on one hand and another adopted son on the other, the Court can grant joint administration to the first two, who are entitled to a larger share in the estate than the objecting son, without going into the question of the validity of the adoption of the latter or of the question whether his rights have lapsed by misconduct or by entering into priesthood. *Maung Ba Tu v. Ma Hla Min*, A.I.R. 1936 Rang. 289 = 168 I.C. 677. It is worthy of mention here that while the grant of letters of administration is discretionary with the Court, the grant of probate is not so, *Hat Chand v. Navalrai*, A.I.B. Sind, 91 = 121 I.C. 173 ; read the notes under sec. 298, post.

This sub-sec. (2) should not be so construed as to confine the Courts' discretion reserved hereby to the selection of one or more of the intending administrators

and to imply an inability on the part of the Court to give a total refusal to all of them. It should be remembered that if an applicant's own case carries with it certain elements of suspicion, the Court has always the power to insist on a strict standard of proof of this applicant's case and to demand that that suspicion be removed, failing which to refuse a grant, *Jnana Govind Choudhury v. Birendranath Goswami*, 69 C.L.J. 347 = A.I.R. 1939 Cal. 595 = 185 I.C. 694; read also the cases cited under the heading, "Suspicious Circumstances" under sec. 283, post.

No Grant in case of ulterior Object :—Where the object of the litigation is not to administer the estate, but merely to obtain declaration of heirship so as to fortify the position of the successful party in a regular suit, no letters of administration should be granted, *Prasanta v. Haricharan*, 17 C.L.J. 66 : 16 I.C. 688. Cf. *Lakshmi Narain v. Nandarani*, 9 C.L.J. 116; vide also *Mohunt Jiblal v. Mohunt Jagamohun*, 16 C.W.N. 798 : 16 I.C. 463; *Akhileswar v. State*, 94 C.L.J. 198 = 59 C.W.N. 240 = A.I.R. 1955 Cal 297. So, it has been said that in absence of any estate or debts of the deceased, no letters of administration should be granted simply to aid a device to secure from the Probate Court a decision upon a contested question of title for an ulterior object, *Hajira Khatoon v. Mustafa Hussain*, 1941 O.W.N. 780 = A.I.R. 1941 Ouuh, 474 = 194 I.C. 410. This principle holds good only in case of intestate succession; but in the case of administration cum *testamento annexo* (as also in the case of probate), a grant cannot be refused on the ground that it is a device to secure from the Probate Court a decision upon a contested question of title which might be of use to the parties in some future litigation, *Durgapada Bera v. Atul Chandra*, 41 C.W.N. 1204 = A.I.R. 1937 Cal. 595.

Sub-sec. (3) : Grant to Creditor :—Where no person claiming interest in the deceased's estate applies for administration, administration can be granted to the deceased's creditor. *Vide Calcutta Testamentary Rules*, No. 10; *Bombay Rules* 571 & 243; *Ingpen on Executors*, p. 105; also notes under sec. 219 (f), post. Letters of Administration to the estate of a deceased insolvent may be granted to his creditor, *Re Makhan Lal*, 15 C.W.N. 360 : 9 I.C. 916.

Administrator-General's Right :—See sec. 7 of Administrator-General's Act (III of 1919); *De Melto v. Broughton*, 11 B.L.R. App. 6. No Letters of Administration should be issued to the Administrator-General except on the application of that officer or of any of the parties, *Mapwa v. Yulwui*, 9 Bur. L.T. 167 : 8 L.B.B. 404 : 84 I.C. 99.

Necessity for Administration :—There is no necessity for administration where the deceased leaves no debts or there is no difficulty in collecting the assets, *Lakshmi Sundari v. Nityananda*, 64 I.C. 6 (Cal.), Cf. *Ramagiri v. Govindamali*, 8 Bur. L.J. 116 : A.I.R. 1924 Rang. 829 : 82 I.C. 824. Necessity of administration is a very pertinent question in the case where the prayer is for grant of letters of

administration, because in the absence of such necessity there may not arise any occasion for the grant of letters of administration at all, read *Chandra Tara Debi v. Srikrishna Chandra Bhattacharjee*, A.I.R. 1928 Cal. 277, cited at p. 877, ante. From

When administration should end. what has been said above it necessarily follows that when all encumbrances on, and all debts due from, the estate have

been discharged and all specific legatees have been paid and no administrative act remains to be done, the administration comes to an end and then the administrator should hand over the property under his charge to the residuary legatee, *Indrani, In re*, 53 All. 422 = 1931 A.L.J. 36 = A.I.R. 1931 All. 212 = 180 I.C. 498.

Joint Hindu Family:—Where a member of a joint Hindu family dies, it is not open to his son, not being the sole surviving co-parcener, to apply for letters of administration to the property alleged to have been left by the deceased as such member of the joint family, *Rumagiri v. Govindamalai*, 8 Bur. L.J. 116 : A.I.K. 1924 Rang. 329 ; 82 I.C. 824 ; *Banwari Lal v. Muksudan Lal*, 1930 A.L.J. 280 = A.I.R. 1930 All. 99 = 122 I.C. 188 ; *In re Balmukunda Dube*, A.I.R. 1930 All. 82 and the other cases cited under the heading, "Pass by survivorship" at pp. 370-71, ante. Cf. *Uttam v. Debi*, 56 P.P. 1919 ; 51 I.C. 651 ; *Re Desu Mana Vala*, 33 Mad. 93 (97). The interest of a member of an undivided Hindu family terminating immediately on his death, no question of grant of administration to another member of the family arises in relation to him, *Gopalaswami Pillai v. Meenakshi Ammal*, 7 Rang. 39 = A.I.R. 1929 Rang. 99 = 115 I.C. 905 ; read also the notes under the heading, "His Estate," at p. 407, ante. In Bombay Letters of Administration are always granted in respect of undivided property of a co-parcener of a joint Hindu family, *Vithal Das Govindram v. Vadilal*, 38 Bom. L.R. 257 = A.I.R. 1936 Bom. 191 = 168 I.C. 129. Where the widow makes an application for a grant on the allegation that the property is her husband's separate property, the Court will accede to the prayer without holding an enquiry as to the character of the property, *Raghunath Misser v. Pate Koer*, 6 O.W.N. 846. cited at p. 406, ante.

Joint Hindu Family Property:—Where there is a will or not, a person to whom co-parcenary property has passed by survivorship has the right to apply for representation under sec. 255 or 256, as the case may be, *Bai Ujambai v. Harek Chand*, 59 Bom. 644 = 37 Bom. L.R. 300 = A.I.R. 1935 Bom. 242 = 166 I.C. 621.

Promissory note as Joint Hindu Family Property:—In the case of a Promissory note executed in the name of the manager of a Hindu Joint family, the other co-parceners are not holders of the instrument as defined by sec. 8 of the Negotiable Instruments Act and they cannot sue on the note *qua* co-parceners. Although the debt is co-parcenary property, still the promissory note itself is not so, because of the special provision of sec. 8, with the result that it can pass only by succession and not by survivorship, necessitating a succession certificate,

Shantaram Vithal v. Shantaram Bhagwan, 40 Bom. L.R. 964—A.I.R. 1938 Bom. 451—178 I.C. 428.

219. [Suc. S. 200] If the deceased has died intestate and *was not a person belonging to any of the classes referred to in section 218*, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules herein-after stated, *namely* :—

(a) [Suc. S. 201] If the deceased has left a widow, administration shall be granted to the widow, unless the Court sees cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Illustrations.

(i) The widow is a lunatic or has committed adultery or has been barred by her marriage settlement of all interest in her husband's estate. There is cause for excluding her from the administration.

(ii) The widow has married again since the decease of her husband. This is not good cause for her exclusion.

(b) [Suc. S. 202] If the Judge thinks proper, he may associate any person or persons with the widow in the administration who would be entitled solely to the administration if there were no widow.

(c) [Suc. S. 203] If there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate :

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration.

(d) [Suc. S. 204] Those who stand in equal degree of kindred to the deceased are equally entitled to administration.

(e) [Suc. S. 205] The husband surviving his wife has the same right of administration of her estate as the widow has in respect of the estate of her husband.

(f) [Suc. S. 206] When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration and willing to act, they may be granted to a creditor.

(g) [Suc. S. 207] Where the deceased has left property in India, letters of administration shall be granted according to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to testate and intestate succession differs from the law of India.

Source of the Law:—The law of this section is taken from the English statutes of Administration and Distribution, *vide* the following statutes.—31 Edw. III, c. 11; 21 Hen. viii., C. 5; 22 & 23 Car. II, C. 10; 29 Car. II, C. 8; 1 Jam. II, C. 17, sec. 7; 58 and 59 Vic. C. 29.

The Section:—This section prescribes the rules according to which the right to Letters of Administration among the deceased's relations, whether by marriage or blood is determined in their *order* of priority. It contemplates administration of the estate and effects of the deceased. These words are taken from the English Law, and the English cases may be referred to for ascertaining their import, *vide*, *Stein v. Ritherdon*, 87 L.J. Ch. 369; *Hamilton v. Buckmaster*, L.R. 3 Eq. 828; *Kirby Smith v. Parnell*, (1908) 1 Ch. 488; *Woolam v. Kenworthy*, 9 Ves., 187; *Hamilton v. Hodson*, 6 Moo P.C. 76; *Dobson v. Bowners*, 5 Eq. 404; *Campbell v. Prescott*, 16 Ves. 507; *Hall v. Hall*, (1891) 3 Ch. 989; *Re Jupp*, (1891) P. 800; *Hodgson v. Jex*, 2 C.D. 1222; but they are used here in India to cover all kinds of property, Cf. *Kirby Smith v. Parnell*, (1908) 1 Ch 488. For the operation of this section, the religion of the nearest relation is wholly immaterial. *Bency Kunar v. Panchanan Majumdar*, 60 C.W.N. 598—A.I.R. 1956 Cal 177. For the application of this section, read also I.L.R. (1953) Bom 745—A.I.R. 1953 Bom 1—A.I.R. 1953 Bom. 228.

Clause (a): Widow's Right to preference:—The widow takes administration in preference to the next-of-kin or heir at law unless she is unfit or otherwise disqualified, by loss of character or interest in the deceased's estate, *Congers v. Ketton*, 3 Hagg. 667; *Re Middleton*, 14 P.D. 28. Illustration (i) to this clause shows the nature of such disqualifications: They are—(1) Lunacy, *Re Cory*, 64 L.T. 270; (2) adultery or elopment, *Fleming v. Pelham*, 3 Hagg. 217, note (b); misconduct, *Re Stevens*, 1898 P. 126; *Re Frost*, 1905 P. 140; *Re Wright*, 1893 P. 21. Besides these there are other grounds of disqualification:—living separate from the husband, *Lambell v. Lambell*, 3 Hagg. 568; divorce *mensa et thoro*, *Re Norcs*, 19 P.D. 35; a decree of divorce by a foreign Court, *Ryan v. Ryan*, 2 Phill., 332; *Re Davies*, 2 Court. 628; but judicial separation resulting from husband's cruelty is no ground.

Re Ihler, S.C. & D. 60. In case of her lunacy, the committee of lunatics can obtain administration on her behalf, *Alford v. Alford*, 1857 Dca. & Sw. 322 "Adultery" in Illustration (i) has been used in its ordinary sense and not in that limited sense in which it has been used in the Penal Code, *Gnanamani Nadathi v. Esunadian Nadar*, A.I.R. 1928 Mad. 797 = 110 I.C. 489.

Re-marriage no disqualification :—The widow cannot be excluded from administration on the ground that she has married again, *vide* Illus. (ii); also *Webb v. Needham*, 1 Add., 494.

"Has no Interest" :—She may be excluded from administration if she has no interest in the deceased's estate. She may be barred, by her marriage settlement or the husband's will, of all interest in the estate, *vide Benson v. Billasis*, 1 Vern., 15; *Lee v. Cox*, 3 Atk 419. She may lose her interest by divorce, *Re Estate of Wallas*, 1905 P. 326.

Widow's right to Citation :—When the widow is passed over or excluded, in certain cases, citation is issued to her to show cause against the exclusion and under certain circumstances, she is passed over without citation. When she is excluded on the ground of misconduct, citation is issued to her. She is passed over without citation in case of divorce, *Re Estate of Wallas, supra*; *Re Frost, supra*; but citation is necessary in case of judicial separation by reason of cruelty on the part of the husband, *Re Ihler, supra*.

Clause (b): Administration to widow jointly with another :—The section gives the Court a discretion to associate another person (or persons) with the widow in the administration of the estate, (*Re Thacker*, 1900 P. 15; *Re Blakelock*, 1 Hogg. 682). But such a person (or persons) should be one, who would be entitled to sole administration in the absence of the widow, see *Annapurna v. Kallayni*, 21 Cal., 164. Ordinarily, the Court prefers sole to joint administration, *Warwick v. Greville*, 1 Phill., 26; but circumstances may justify the making of an exception to this rule, *Re Richards*, L.R. 2 P. & D. 217; *Re Richardson*, L.R. 2 P. & D. 245 (246); *Re Browning*, 2 Sw. & Tr. 634.

Clause (c):—In the absence of the widow or if she is excluded, right of administration belongs to person "beneficially interested" in the estate according to the rules for the distribution of an intestate's estate. In Henderson's invaluable work on the law of succession, such persons are mentioned in the following order—(1) Husband or wife, (2) Children, (3) Grand children, (4) Great grand children, (5) Father, (6) Mother, (7) Brothers & Sisters, (8) Grand parents, (9) Uncles, aunts, nephews, nieces, (10) Cousins. In case of contest between two relations of the same degree, whole blood will be preferred to half-blood, *Stratton v. Linton*, (1861)

31 L.J.P. 48. For rules regarding the distribution of an intestate's estate, vide Part V, Ch. II., ante.

Proviso to Cl. (e):—It mentions only the mother, but we have seen under sec. 42 that the father has a preference over the mother.

Clause (d): Next of Kin of equal degree:—Under this section the kindred standing in equal degree are equally entitled to administration. In this respect the Indian law is somewhat different from the English practice according to which the Court generally takes into consideration the respective ages, sexes, personal capacities of the relations concerned into question; consult the following cases, *Budd v. Silver*, 2 Phil., 115; *Re Stainton*, L.R. 2 P. & D. 212; *Tucker v. Westgarth*, 1 Add. 352; *Sawbridge v. Hill*, 2 P. & D. 220. The clause says that the next-of-kin of equal degree are *equally* entitled to administration; that does not however mean that they are to be *jointly* appointed. *Stoney v. Stoney*, 2 Pat. 261: 4 Pat. L.T. 161: (1923) Pat. 130: A.I.R. 1923 Pat. 848 (2): 72 I.C. 811; but see *Re Stephen*, 1 B.L.R. Short notes, iii. In this case the Court, in its discretion, preferred one brother to another (though both were of the same degree) on the ground that the latter brother was indebted to the deceased's estate. Likewise, in another case the Court refused the application of one relation of the deceased on the ground that the applicant had concealed the names of the deceased's relations, see *Jcikisondas v. Harrakisondas*, 2 Bom., 9. The Court is not bound to make a joint grant in favour of both the persons standing in equal degree of kindred and may prefer one to the other, *Dinbai Behramji v. Motibai*, 43 Bom. L.R. 770—A.I.R. 1941 Bom. 856—198 I.C. 22.

Clause (e): Husband's right:—Compare this section with section 35, ante. Upon the death of the wife intestate, the husband has a preferential right to administer her estate, just in the same way as the widow has under clause (a) above to administer her deceased husband's estate. Cf. *Humphrey v. Bullen*, 1 Atk. 459. Vide the English statutes, 31 Edw. III, Cl. 11 and 29 Car. II. C. 3. sec. 25; also *Ibid.* C. 10. But the Court can in its discretion exclude him or pass him over for good reasons, such as (1) non-appearance when cited, *Re Moore*, 1891 P. 299; *Re Andrew*, 1898 P. 147. (2) Invalidity of his marriage, *Browney v. Reane*, 2 Phillim, 69; but see *Wilkinson v. Gordon*, 2 Add. 152. (3) Desertion of wife, *Re Stephenson*, L.R. 1 P. & D. 289; *Re Shoosmith*, 1894 P. 28. (4) Dissolution of marriage, *Re Hay*, L.R. 1 P. & D. 51; *Re Wallas*, 1905 P. 326. Cf. *Re Jones*, (1904) 74 L.J. 27; (5) Waiver of his right by mutual agreement, *Re Councill*, L.R. 2 P. & D. 314. *Allen v. Humphrys*, 8 P. & D. 16. (6) Murdering the wife, *Perry v. Strawbridge*, (1910) 209 Miss. 621; *Vedanayaga v. Mudaliar*, 27 Mad. 691. (7) Insolvency. (N.B.—In this case administration can be taken by the husband's trustee in bankruptcy, *Re Turner*, 12 P.D. 18). If the husband dies before taking out administration it may be granted to his personal representatives, *Re Harding*, L.R. 2 P. & D. 894.

Clause (f): Creditor's right:—Where there are no matrimonial or blood relations of the deceased, or where such relations are not willing to act, administration can be granted to the deceased's creditor. *Vide* sec. 218 (3) and the notes thereunder. The creditor comes in only on the failure of the other representatives, *Graham v. Maclean*, 2 Curt. 663. The creditor has not only to allege but also to establish by evidence that the deceased had no relations, matrimonial or consanguineous, *Ramdas v. District Judge of Jhansi*, A.I.R. 1984 All. 885 = 150 I.C. 748. A person taking an assignment of the debt from a creditor after the death of the intestate, is not a creditor within the meaning of this clause, *Re Foy*, 98 L.T. 49; *Re Coles*, 8 Sw. & Tr. 181; *Day v. Thompson*, 8 Sw. & Tr. 169. A surety of the intestate, if made to pay the amount of security, will be the intestate's creditor within the meaning of this clause, *Williams v. Jukes*, 84 L.J.P. & M. 60; *Re Burdett*, (1876) 1 P.D. 427. In case of several creditors, the creditor for the biggest debt will be preferred, *Ernest v. Eustace*, Deane, 291. The Administrator-General has a preference over the creditor; so before appointing the latter citation should be issued to the Administrator-General, Cf. secs. 8 and 32 of Act III of 1913 (Administrator-General's Act).

Clause (g): Intestate of Foreign Domicile:—If the intestate leaves property in India, administration of his property will be carried out according to the rules of this section notwithstanding the fact that he has a foreign domicile and his *lex domicili* differs from the Indian law, or, in other words, the *lex situs* will prevail over the *lex domicili*, *vide*, the notes at pp. 20-24, *ante*. See also *Enochin v. Wylie* (cited at p. 24, *ante*); *Preston v. Melville*, 8 Cl. & Fin., 1.

220. [Pro. S. 14 & Suc. S. 191] Letters of administration
 Effect of letters of entitle the administrator to all rights belonging administration to the intestate as effectually as if the administration had been granted at the moment after his death.

Effect of Letters of Administration:—The title of an administrator arises only from grant of Letters of Administration; until a grant is made in his favour, the administrator is absolutely a stranger to the estate, *Bahuria Ram v. Binderwari Saran*, A.I.R. 1936 Pat. 41 = 159 I.O. 842; but the position of an executor is different, as he derives his authority from the will itself and not from the grant, *Sona Nayna v. Sona Navena*, 20 C.W.N. 893 : (1916) 1 M.W.N. 456 : 18 Bom. L.R. 642 : 95 I.C. 328 (P.C.); *Kadiyala Venkata v. Katreddi Ramayya*, 59 I.A. 112 = 55 C.L.J. 263 = 36 C.W.N. 441, P.C. Cf. *Charu Chandra v. Nahush Chandra*, 50 Cal. 49 : 3 C.L.J. 35 ; A.I.R. 1923 Cal. 1 : 74 I.C. 630 : *Antony Cruz v. Mathes*, 94 Mad. 895 ; *Hiatu Baksh v. Debendra*, 29 C.L.J. 58 ; 49 I.C. 532 ; *Foster v. Bates*, 9 L.J. Exch. 83; so he can not maintain a suit in his capacity as an administrator until administration is issued to him, *Administrator-General v. Lalit Molun*, 12

G.W.N. #38. It is however sufficient if the grant is obtained before the decree (though after the institution of the suit); *Sinha v. Grace Edith*, 38 Bom. 618 : 16 Bom. L.R. 534 : 28 I.C. 114; *Re Masonic, A. Co.*, 32 C.D. 879. Cf. *Harihar v. Harendra*, 37 Cal. 754; *Rajnarain v. Universal Life Assurance Co.*, 7 Cal., 574; *Tuljaram v. Bamanji*, 19 Bom., 828. The grant entitles the administrator to all rights belonging to the intestate as effectually, as if the administration had been

granted at the moment after his death. Or, in other words,
Doctrine of Relation back, the title of the administrator relates back to the date of death
of the Intestate, *Morgan v. Thomas*, 8 Exch., 802; *Re Watson*,

18 Q.B.D. 116 ; 19 Q.B.D. 284 ; *Re Pryse*, 1904 P. 801 ; *Humphreys v. Humphreys*, 3 P. Wms. 849 ; *Hatu Baksh v. Debendra*, 29 C.L.J. 68 : 49 I.C. 582 (ref. to 30 Cal. 1044). *Comp. Temul Ardshar v. Bejanji*, A.I.R. 1956 Bom. 169. This doctrine however does not validate all the intermediate acts of the administrator; *vide* notes under sec. 221. In this respect the executor stands on a different footing, *vide* sec. 227, *infra*. The doctrine only permits the appointment to operate retrospectively so as to entitle the administrator to sue after the grant, in respect of matters occurring previously thereto, *Humphreys v. Humphreys*, *supra*; also *Charu Chandra v. Sarat Chandra* 10 C.L.J. 597 (543) ; *Louis Kunha v. Coelho*, 81 Mad. 187. To validate a transaction by an administrator, the grant of Letters of Administration should be actually issued to him. It is not enough that an order for grant to him has been made. Thus, a mortgage executed by an administrator, after an order for grant to him of letters of administration before their issue, is not binding on the estate. *Bahuria Ram, v. Bindeswari Saran*, A.I.R. 1936 Pat. 41 - 159 I.C. 342 ; *Bamcharan v. Dharchar*, 31 Pat. 993 - A.I.R. 1954 Pat. 175. A grant hereunder does not affect contentions based on title paramount, *Jhon Simon v. George*, A.I.R. 1955 Trav.-C. 177.

No Administration where property goes by Survivorship:—Where the person applying for Letters of Administration alleges that the deceased was a member of a joint Hindu family and his property has passed by Survivorship to the applicant, the application fails inasmuch as the deceased has left no estate to which administration can be granted, *Kali Kumar v. Nufabati*, (1922) Pat. 240 : A.I.R. 1928 Pat. 96 (1) : 70 I.C. 155. Read the notes under the heading, "Joint Hindu family" under sec. 218, *ante* at p. 411, *ante*.

221. [Pro. S. 15 & Suc. S. 192] Letters of administration do not render valid any intermediate acts of administration. The Letters of administration tending to the diminution or damage of the intestate's estate.

Scope of the Section:—This section as well as the preceding one refer only to intestate succession; and, therefore the Letters under these sections must necessarily be without any copy of the will annexed.

Executor and Administrator:—The former derives his authority from the will and not from the grant; whereas the latter derives his authority from the grant with retrospective operation for a limited purpose, but not so as to validate all his intermediate acts, *vide* the cases cited under the last section; *vide* also the notes under sec. 211, *supra*. After the grant the administrator's powers are like those of an executor. Cf. Sec. 211, *supra*.

Intermediate Acts:—Under section 227, all the intermediate acts of the executor are valid. But under this section the intermediate acts of the administrator tending to the diminution or damage of the intestate's estate are not validated by the appointment, see *Hiatu Baksh v. Devendranath*, 29 C.L.J. 68 : 49 I.C. 632. But acts done by the administrator for the benefit of the estate, will bind the estate even though they were done before the grant. Thus, where the administrator received an advance of money by executing a mortgage after the order of grant but before its actual issue for the purpose of paying court-fees for the letters of administration, the mortgagee would be entitled to get his money with reasonable interest out of the estate funds. The mortgagee would get reasonable interest and not contractual interest, because the administrator had not the right to enter into a contract on behalf of the estate, at the time of making the mortgage, *Bishuria Bam v. Bindeswari Saran*, A.I.R. 1936 Pat. 41—169 I.C. 942.

222. [Pro. S. 6 & Suc. S. 181] (1) Probate shall be granted Probate only to ap. only to an executor appointed by the will. appointed executor.

(2) [Pro. S. 7 & Suc. S. 182] The appointment may be expressed or by necessary implication.

Illustrations.

(i) A wills that C be his executor if B will not. B is appointed executor by implication.

(ii) A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law C, and adds "but should the within-named C be not living, I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.

(iii) A appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words,—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates." The nephew is appointed an executor by implication.

Sub-sec. (1): Only Executor entitled to Probate:—Probate can be granted only to an executor appointed by the will, [Cf. *Mithihai v. Oanji*, 26 Bom., 571 : 4 Bom. L.R. 9], whether expressly or by necessary implication, *Edward Watson Coleston v. Theresa Chitty*, 1934 A.L.J. 1089 = A.I.R. 1934 All 1058 = 162 I.C. 124. There is no appointment, express or implied, where the will says that any of the sons of "A" will be an executor, A.I.R. 1945 Lah. 8. The section is imperative as is indicated by the word "shall." A universal legatee is not entitled to probate, but only to letters of administration with a copy of the will annexed, *Pandit Prayrag Raj v. Goukaram*, 6 C.W.N. 787; *Ex parte v. Vithaldas*, 15 Mad., 360; *Re Soshee Bhushan*, 19 Cal. 582; *Basamma v. Shivaji Gowda*, 49 Mys. H.C.R. 210 = 22 Mys. L.J. 224; *Re Leslie Devision*, (1955) 2 M.L.J. 657. Cf. *Gordhandas v. Bai Ram Coomar*, 26 Bom., 267; *Kumar Chandra v. Prosanna*, 10 C.W.N. 864. Cf. *Badrissa Mohun Sett*, 7 B.L.R. 563. There is nothing in the Act however to prevent an executor from acting as executor and exercising the powers under the Act without obtaining probate, Cf. sec. 227, *infra*. See also *Ganepathi Iyer v. Sivamalai*, 36 Mad. 575 : 12 M.L.T. 207 : 29 M.L.J. 806 : (1912) M.W.N. 1112 : 17 I.O. 4. Cf. *Soona Mayna v. Soona Navena*, 43 I.A. 118 : 20 C.W.N. 888 : 18 Bom. L.R. 649 : 86 I.C. 928 (P.C.); *Kadiyala Venkata Subamma v. Katreddi Ramayya*, 69 I.A. 112 = 55 C.L.J. 268 = 36 C.W.N. 441, P.C.

When Probate can be granted:—A probate can be granted only when the will has been proved in accordance with law. Inasmuch as a grant of probate operates as a judgment *in rem*, the Court must be satisfied that the will has been duly executed and attested, *Ameer Chand v. Mohanund Bili*, 6 C.L.J. 453. Cf. *Manmohini v. Banga Chandra*, 31 Cal., 957. Non-registration does not falsify a will, *Ishwardeo Narain v. Sm. Kamta Devi*, A.I.R. 1954 S.C. 280.

Probate of a part of will:—A will may be admitted to probate only in part; the whole document may not be probated, *Girish Chandra v. Rashbehary*, 1 C.L.J. 109; *Sugden v. Leonards*, L.R. 1 P. & D. 154; *Woodward v. Goulstone*, L.R. 11 A.C. 469; *Kedarnath v. Sarojini*, 3 C.W.N. 617.

Question of Title:—The Probate Court is concerned only with the question of genuineness of the will, its due execution and attestation and the testamentary capacity of the testator; it is no part of the jurisdiction of the Probate Court to pronounce on the validity of the bequest, *Ishwardeo Narain v. Sm. Kamta Devi*, A.I.R. 1954 S.C. 280. The question of title should not be gone into at the time of hearing the application for probate, *Brijnath v. Chunder Mohan*, 19 All., 468. Compare the notes at p. 408, *ante*. Read also *In re Estate of Alice Skinner*, 58 All., 22; *Baisnav Charan v. Kishore Das*, 15 C.W.N. 1014; *Mahasunder v. Ram Ratan*, 1 Pat. L.W. 370 ; 35 I.C. 416; *Beharilal v. Ganga*, 1 Pat. L.W. 744 : 41 I.C. 279; *Nathon v. Nathon*, 7 C.W.N. 878 = A.I.R. 1930 Oudh. 272 ; 128 I.C. 220; *Bai Parvatibai v. Raghunath Lakshman*, 42 Bom. L.R. 1063 = A.I.R. 1941 Bom. 60 = 192

I.C. 681. *Vide* notes under sec. 227, *infra*.

Refusal of Grant, where will ineffectual:—Probate of will cannot be refused on the ground simply that it is what the lawyers in ancient time called "ineffectual." That doctrine does not apply to India, *Rammol Das v. Hakul Kuli*, 22 C.W.N. 315 : 48 I.C. 208. A Probate Court should concern itself only with the questions of the genuineness of the will and the testamentary capacity of the testator and should not bother itself with the question of the validity of the will or the efficacy of the disposition, *Bua Ditta Mal v. Devi Ditta Mal*, A.I.R. 1931 Lah. 130 - 132 I.C. 527.

Effect of Grant:—Probate is only conclusive as to the appointment of executors and the validity and the contents of the will, *Chintaman v. Ram Chandra*, 34 Bom. 589 : 13 Bom. L.R. 694 : 7 I.C. 944 ; *Rala Bandi v. Rala Bandi*, 31 M.L.J. 277 : 4 L.W. 248 : 35 I.C. 854. It does not give any sanctity or efficacy to the provisions of the will but only furnishes a proof for its contents. *Ramchandra v. Ramhai*, 39 Bom. L.R. 165 = A.I.R. 1937 Bom. 341 - 170 I.C. 960. If does not confer any title to the property on the executor, if the testator had none at all. There is no difference between the effect of a probate grant and that of an administration grant, 31 M.L.J. 277. *Vide* also sec 227 and the notes thereunder. Unless a grant is obtained, the will cannot prove the title of any person named therein by the testator, *Basunta Kumar v. Gopal Chandur*, 18 C.W.N. 1136 : 26 I.C. 21.

Legatee has no right to set up title in conflict with Will:—A person who takes property under a will and not by inheritance is bound by the terms of the will and cannot set up title by inheritance, *Bhimrao v. Punjab Rao*, 18 N.L.J. 1 - 168 I.C. 1042.

Executor appointed by Will:—An executor can be appointed only by the will. As to what is or is not a will, see, *Brijraj Singh v. Sheoden*, 38 All., 887 : 17 C.W.N. 449 : 18 C.I.J. 57 (P.C.) ; *Baisnab Charan v. Kishore Das*, 16 C.W.N. 1014 : 11 I.C. 152. *Vide* also the notes at pp. 12-14, *ante*. A testamentary instrument appointing an executor may be admitted to probate though it makes no attempt to dispose of any property, *Brownrigg v. Pike*, L.R. 7 P.D. 61 ; *Stewart v. Stewart*, (1901) p. 177 Mass. 498 ; but see *Re Fraser*, L.R. 2 P. & D. 40 ; or is otherwise inoperative or void, *Behary Lal v. Jugomohun*, 4 Cal. 1. Cf. *Townsend v. Moore*, 1905 P. 66 ; *Re Fraser*, L.R. 2 P. & D. 40 ; *Contra-Brenchly v. Still*, 2 Rob. 162. Compare the following cases, *Mohunt Bhagaban v. Mohant Boghanandan*, 22 I.A. 94, 22 Cal. 843 ; *Chaitanya Gobinda v. Dayal Gobinda*, 32 Cal., 182 ; *Tara Charan v. Suresh Chandra*, 16 I.A. 166 : 17 Cal., 122 (in this case the will only made provision for management of the property without giving the beneficial interest therein to any body). A derivative executor (*i.e.* executor's executor) is not appointed

by the will and is therefore not entitled to any probate, *Sushilabai v. Govind Ganesh*, A.I.R. 1958 Madh. Pra. 372.

Court's Discretion :—In the matter of granting a probate, the Court has no discretion, *Prannath v. Jadunath*, 20 All. 189. The Court cannot refuse probate on the ground that the applicant is not a fit or proper person, *Hara Coomar v. Doorgamoni*, 21 Cal. 195 (199). Probate cannot be refused on the ground that the testator had no power of disposition, *Barat v. Baunlu*, 18 Bom., 749; Cf. *Hornusji v. Bai Dhanhaiji*, 12 Bom. 164; or on the ground of the executor's bankruptcy, or felony, *Smithhurst v. Tomlin* 2 Sw. & Tr. 147; or his bad character, *Re Samshn, supra*. But it has been held that probate should be refused where it is found that the testator, at the time of execution of the will, was in a weak state of health and under the influence of the executors and that he had not a disposing mind at the time, *Prag Devi v. Nathumal*, 7 Lah L.J. 330: Punj L.R. 556. Cf. *Maya Ram v. Malan Devi*, 145 P.L.R. 1915: 66 P.W.R. 1916: 29 I.C. 667; *Behari Lal v. Ganga*, 1 Pat. L.W. 744: 41 I.C. 279.

Power of Probate Court :—A probate Court after it has granted a probate has no power to give the grantee possession of any property without further proceedings, *Nga Pwe v. Michan*, 1 U.B.R. (1910) 69: 10 I.C. 993. A Probate Court has no power to refuse probate because the testator had no disposing power, *Barat Parshotam v. Bai Mu'i*, 18 Bom. 749. This is so as the Probate Court has no power to go into the question of title, *Nathon v. Nathon*, 7 O.W.N. 373=A.I.R. 1930 Oudh, 272-123 I.C. 220.

Who can be Executors :—Generally speaking all persons capable of making wills are eligible for being appointed executors,—Wms. 232. There is no bar to a MINOR being appointed an executor, though probate cannot be granted to him until after he has attained majority, sec. 223, *infra*; Williams on Executors, 10th Ed. 159. Cf. *Re Sewnarain Manata*, 21 Cal. 911; *Anup Singh v. Sohan Singh*, 44 P.L.R. 1915: 220 P.W.R. 1915: 27 I.C. 749. So also even a person of unsound mind can be made an executor, though no probate can be granted to him, see sec. 223; the grant can be made in favour of his Committee, *Re Philips*, 2 Ad. 336, note (b). Bankruptcy or bad character is likewise no bar to a person being appointed an executor, *Re Samson*, 3 P. & D. 48; but see *Hills v. Mills*, 1 Salk., 36; *Laugley v. Hawk*, 5 Mad., 46; the Calcutta decision of *Re Jackson*, Mortons Rep. 28; nor is fraud any bar, *Re Mary Hile*, 6 Jur. 350. The exhibition of bad temper is no disqualification for executorship, *Baidyanath Sein v. Rajendranath Sein*, 52 C.L.J. 68. The executor's title is not defeasible by bankruptcy, *Smithhurst v. Tomlin*, 2 Sw. & Tr. 147. Aliens can be executors, Williams on Executors, 10th Ed. p. 183. For corporations and Court of Wards, Administrator-General, *vide infra*. A firm may be appointed executors, *vide* next paragraph. For a married woman's position, *vide* sec. 223, *infra*.

Partnerships :—We have seen that a firm may be appointed executors. But where a firm is so appointed, the appointment will refer only to those who are members of it at the date of the will unless the contrary is intended; where a "member of a firm" has been appointed executor without specification of name, any person who applies for probate must prove that he was a member of the firm both at the date of the will and at the time of the testator's death, *In the goods of George Nash*, 29 C.W.N. 373 : A.I.R. 1925 Cal. 606 (1) = 94 I.C. 994.

Corporations :—May be executors, and obtain grant through "syndics." Cf. *Re Hunt*, 1896 P 289 ; *Re Crangan*, 1 Hagg. 548. For officials acting under the Administrator-General Act (III of 1913) and the Official Trustees Act (II. of 1913). *vide* thesee Acts. Cf. *Re Manic Lal*, 87 Cal., 387 (390).

Court of Wards :—The Court of Wards is not entitled to grant of probate or Letters of Administration, see *Gangessar v. Collector of Patna*, 25 Cal. 796 ; but it seems that the nominees of such Court of Wards may obtain a grant, *Treycluckonath v. Alministrator-General*, 10 C.W.N. 241. Cf. *Bhagawati v. Bahuria Ram*, 1920 Pat. 187 : 1 Pat. L.T. 304 : 6 Pat. L.J. 347 : 57 I.C. 588.

Probate when Testator Domiciled abroad :—The will of a testator domiciled abroad although not proved in the place of the testator's domicile is capable of probate in British India if it is valid according to the law of the testator's domicile and if he leaves property here. *Scona Mayna v. Scona Narena*, 43 I.A. 113 : 20 C.W.N. 833 : (1916) 1 M.W.N. 455 : 18 Bom. L.R. 642 : 85 I.C. 323 (P.C.) Cf. *Wnicker v. Hume*, 7 H.C.L. 124. Cf. *Mahomed Koya v. Katheesa*, (1944) 2 M.L.J. 365.

Sub-sec (2) : Appointment how made :—Under this sub-section there are two modes of appointment, (1) by express terms, (2) by necessary implication. No difficulty arises in the first case where the executor is expressly appointed by the will. In the other case, whether an executor has or has not been appointed is to be gathered from the will itself. Cf. *Hari Chaitynya Sinha v. Ramam Sinha*, A.I.R. 1928 Cal. 164 = 105 I.C. 626 [Executor appointed by necessary implication.] An executor appointed by necessary implication is also called an executor "according to the tenor", *Gnanamani v. Eunadsan Nadar*, A.I.R. 1928 Mad 797 = 110 I.C. 489. Cf. 22 W.R. 174 ; 30 Mad. 191; or a constructive executor, *Encjo Clunder v. Raj Kumar*, 6 C.W.N. 810 ; *Kripamoyi v. Mohe'h Chunder*, 10 C.W.N. 232 ; *Re Courjan*, 25 Cal. 65. In England, the testator can delegate his power of appointing an executor to the legatees; therefore the nominees of such legatees can obtain probate, *Re Ryder*, 2 Sw. & Tr. 128. Under the Indian law it is not fully settled though suggested that an appointment by delegation is possible. Cf. *Mosia Haji v. Haji Abdul*, 5 Bom. L.R. 639, following *Re Deichman*, 3 Court. 128 see also *Re Crangan*, 1 Hagg. 548. Therefore, where a testator appoints a person to nominate

an executor, the executor nominated by the appointee will become as executor by necessary implication. *Durga Das Poosary, Re*, 1934 A.L.J. 596 = A.I.R. 1934 All. 804 = 150 I.C. 1018—following 6 Bom. L.R. 689. Where there is an express appointment, of an executor, it is unlikely that another person has also been appointed an executor in an indirect way, i.e. appointed an executor according to the tenor, *Gnanamani v. Esunadian Nadar*, A.I.R. 1928 Mad. 797 = 110 I.C. 489.

Necessary Implication:—To constitute an executor by implication, it is necessary to show that on a reasonable construction of the will the testator appears to have intended such person to collect his assets, pay the debts and funeral expenses, and discharge the legacies and generally administer the estate. *In bonis Wilkinson*, 1892 P. 227; *Ameerchand v. Mahanund Bibi*, 6 C.L.J. 453. Thus, a provision in the will that "my nephew is to discharge the debts due by me to the world", constituted the nephew an executor by implication, *Viramma v. Seshamma*, 60 M.L.J. 264 = 1931 M.W.N. 213 = A.I.R. 1931 Mad. 343 = 132 I.C. 127. Again, a testator appointed a person as executor on behalf of certain minors. Held, that the minors must be taken to have been appointed executors by necessary implication and entitled to probate on attaining majority, *Harichaitanya v. Ramram Sinha*, A.I.R. 1928 Cal. 164 = 105 I.C. 626. A person directed by the will to perform the functions of an executor, is an executor, appointed by necessary implication, or an executor according to the tenor, and can apply for probate, *Swatantranandji v. Lunidaram*, 99 Bom. L.R. 490 = A.I.R. 1937 Bom. 397 = 171 I.C. 411. The words must indicate a general power of receiving and paying what is due to and from the estate of the deceased. *In bonis Jones*, 2 Sw. & Tr. 155; *Re Toomey*, 3 Sw. & Tr. 562; *Mithibai v. Canji Kheraj*, 26 Bom., 571 : 4 Bom. L.R. 9. For the test to be applied for determining whether a person is an executor according to the tenor of the will, read *Deveeramma v. Nanjappa*, A.I.R. 1961 Mys. 160. A trustee is not an executor by necessary implication. Cf. *Re Kirby*, 1902 P. 188; *Re Leven & Melville*, 7 L.R. Ir. 178; *Baroda Prasad v. Gajendra Nath*, 9 C.L.J. 388 = 18 C.W.N. 557; *Hara Coonar v. Doorgamoni*, 21 Cal. 195 (199); thus, where the testator directed several persons to take charge of the estate and to carry on the daily Poojab, such persons were not constituted executors thereby, *Appacoottu v. Muthukumarappa*, 30 Mad. 191. Probate may be granted to a *shelait* as an implied executor, *Kalicharan v. Annoda Kanta*, 15 C.W.N. I : 8 I.C. 764, relying on 6 C.W.N. 810. Powers and duties of an executor are essentially different from those of a trustee. If it can be gathered from the words of the will that the trustee has been given a power to collect the assets and pay the debts and generally to administer the estate, the trustee is an executor by implication, *Re Panchar*, L.R. 2 P.D. 369; *Re Lawry*, L.R. 3 P.D. 157; *Re Monohar Mukherjee*, 5 Cal. 756, following *Re Baylis*, L.R. 1 P. & M. 21. But mere direction to pay certain debts out of a certain property is not sufficient to warrant the inference of executorship by implication, *Kuppayammal v. Ammani Ammal*, 22 Mad., 346; *Kali Churn v. Annoda*, 15 C.W.N. 1; Nor does the mere fact that the will has been addressed

to a person, constitute him the executor by implication, *Re Amritalal Mukerji*, 5 C.W.N. xviii (98); *Re Vitaldas*, 15 Mad. 360. Likewise, a direction to take care of the estate during the minority of a son, who was to be an appointment of appointed, and to provide for maintenance of such minor executors.

So is not appointment by implication, *Seethama v. Chennappa* 20 Mad. 467; *Ramdan v. Manibai*, 25 Bom. 429. See also *Lado v. Sibhag Rani*, 9 Lah. L.J. 152 - 28 P.L.R. 220 - A.I.R. 1927 Lah. 770 - 102 I.C. 194. A direction or request to a person to remain a trustee, guardian and friend, was held not to constitute him a trustee, *Gopal Das v. Burdeo Das*, 83 Cal. 657 : 10 C.W.N. 66. See also *Lado v. Sibhag Rani*, 9 Lah. L.J. 152 : 28 Punj. L.R. 220 : 102 I.C. 194. To give power to manage oneself or to appoint a manager is not to appoint an executor by necessary implication, *Swatantranandji v. Lundiram*, 39 Bom. L.R. 490 - A.I.R. 1937 Bom. 397 - 171 I.C. 411. The appointment of executors by necessary implication is not to be favored, and the language of the will is not to be strained for this purpose; but in doubtful cases, letters of administration with the will annexed, might be granted, 6 C.L.J. 453. The mere fact that an elder son is appointed as a trustee of the minor younger son is insufficient to show that he was appointed, executor of the will, *Re Jannat*, 7 L.B.R. 266 : 25 I.C. 820. In an old case, *Mun Mohun Ghosal v. Pareshnath*, 22 W.B. 174, a sole residuary legatee was held to be entitled to probate as an executor by implication. But it has been held in England that a universal legatee is not an executor according to the tenor, and though entitled to prove the will, he is not entitled to probate, *Re Oliphant*, 1 Sw. & Tr. 525, followed in *Re Vital Das, supra*.

Executor for a Limited Purpose:—Now the appointment of an executor may be absolute, or it may be for a limited purpose. Thus, where the executor is directed to manage the property during the minority of an adopted son and to hand over the properties to such son on his attaining majority, there is a limitation to his powers in point of time. Likewise there may be limitations to his powers in point of place or as to the subject matter. Thus, an executor may be appointed, with respect, to the properties at a particular place, *Re Gladstone*, 1 C. 168; *Re Cohen*, (1902) 1 Oh. 187, or with respect, to a particular branch, of his estate, *Re Parker's Trusts*, (1894) 1 Ch. 707. Limitations to the executor's powers may also arise from the imposition of conditions to be fulfilled, *Re Langford*, L.B., 1 P. & D. 458; *Re Wilmot* 1. Curt., 1. Cf. *Hormuyi v. Bai Dhanbaiji*, 12 Bom. 164. It is open to a testator to impose restrictions upon the powers and discretion of an executor. But if such restrictions are injurious, the executor can override them with the previous sanction of the Court. Cf. *Eastern Mortgage Agency & Co. v. Rebati Kumar*, 3 C.L.J. 260. Cf. *Manki Koer v. Maurakhan*, 56 I.C. 841 (Pat).

Conversion of Probate application into one for Administration:—An application for probate cannot be converted into one for Letters of Administration, if

Behari Lal v. Ganga, 1 Pat. L.W. 744 : 41 I.C. 279.

Co-adjutors or Overseers:—Are persons nominated by the testator to assist and advise the executors in the discharge of their duties, see *Eastern Mortgage & Co. v. Rebati Kumar*, 3 C.L.J. 260. The distinction between a co-adjutor and an executor consists in this that the former does not administer the estate, nor does he in any way interfere with the management of the estate except by counsel or advice to the executor ; whereas an executor is charged with the actual management of the estate. A co-adjutor serves to prevent the negligence or dereliction of duties on the part of an executor. He has power to approach the Court and complain against the executor in case the latter should fail in his duties, *Brojo Chunder v. Raj Kumar*, 6 C.W.N. 310 ; *Sayaji Nagooji v. Muthumabai*, 6 Bom. L.R. 78. If a co-adjutor is charged with the duty of assisting in the actual management of the estate, he may be a co-executor according to the tenor, vide *Powell v. Stratford*, 3 Phillim Eco. Rep 118. Thus, where the will provided that certain transactions relating to his estate should be entered into only with the assent of N, the Court held that N was neither an executor by implication, nor a mere overseer but was a person whose assent, the testator intended should be obtained to validate certain classes of transactions as the testator had confidence in his judgment and integrity. It was further held that it was open to the testator to impose restrictions upon the powers and discretion of an executor and if in practice such restrictions proved injurious to the actual administration of the estate, it was equally open to the executor to apply for suitable directions from the Court, *Eastern Mortgage Agency & Co. v. Rebati Kumar*, 3 C.L.J. 260.

223. [Suc. S. 183 & Pro. S. 8] Probate cannot be granted to Persons to whom probate cannot be granted. any person who is a minor or is of unsound mind,* nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the State Government in this behalf.†

The Section :—The section is silent as to who can or cannot be appointed an executor, but only lays down to whom probate cannot be granted. Vide the notes under the heading, "Who can be Executor" at p. 421, ante. As to the position of association of individuals registered into a society by Act XXI of 1860, see *Mahasaya Krishna v. Maya Devi*, 49 P.L.R. 226 – A.I.R. 1948 Lah. 54.

* Here the words "nor unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the previous consent of her husband" have been omitted by Act xviii of 1927 ; vide notes under the heading "Married Woman", infra, at p. 426.

† The words in italics have been inserted by Act xvii of 1981, the words "State Government" replacing "Provincial Government" by reason Adaptation of Laws Order, 1980.

Minor :—As already observed, minority is no bar to one's being appointed an executor, though Probate cannot be granted to him. *Vide Sewnarain Mahata*, 21 Cal. 911. See also *Anup Singh v. Sohan Singh*, 44 P.L.R. 1915 : 220 P.W.R. 1915 : 27 I.C. 749. Cf. *Lowell v. Cox*, cited in *West v. Wilby*, 3 Phillim., 879. But letters of administration with the will annexed may be granted to the guardian of the minor till he attains majority, under sec. 244, post, *Re Girish Chunder*, 6 C.W.N. 681; *Barada Pershad v. Gajendra*, 9 C.L.J. 389 : 13 C.W.N. 657; *Bhag Mal v. Malik Singh*, A.I.R. 1931 Lah. 229-181 I.C. 889. But where there are other legatees, the guardian of the minor cannot be granted the letters on behalf of the minor. *Ma Swa v. Ma Thit*, 5 Bur. L.T. 285 : 6 L.B.R. 118 : 18 I.C. 187. For the definition of the word, *vide* pp. 6 and 11, ante. Minority is to be calculated with reference to this Act. Thus, a person who was only 16 (and attained majority under the law of Bikanir), was held to be under disability within the meaning of this section, see *Ite Sewnarain Mahata*, *supra*.

Unsound Mind :—Insanity is no disqualification for appointment as an executor, although Probate cannot be granted during the period of such disability, the lunatics being incapable of acting as executors or administrators, *Evans v. Taylor*, 2 Rob., 128. *Vides* notes at p. 421, ante.

Insanity after Grant :—If the executor (or the administrator), becomes insane (*non-compos mentis*) after obtaining the grant, administration can be committed to another suitable person, *Evans v. Taylor*, 2 Rob. 128; *Hells v. Mills*, Salk., 36.

Married Woman :—Formerly, probate could not be granted to a married woman (except in the case of Hindus etc.) without the previous sanction of her husband. Cf. *Williams On Executors*, 11th Ed. pp. 154, 724, 1462; *Cootes*, 15th Ed. pp. 67 73, 533, 629. By reason of the provisions of secs. 20 and 59, a married woman is capable of making wills. It therefore did not stand to reason why she should be under such a restriction. Consequently, the law has been amended (following an alteration in the English law) by omitting the words "nor, unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, to a married woman without the previous consent of her husband" from the section; see Ind. Sue. (Amendment) Act, XVIII of 1927. Cf. *Bullers v. Harvey*, 8 Curt 60.

Brahmos :—As to whether they are Hindus under this section, *vide* 26 C.W.N. 789, cited at p. 19, ante.

224. [Pro. S. 9 & Suc. S. 184] When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of B's will by express appointment and C an executor of it by implication. Probate may be granted to A and C at the same time or to A first and then to C or to C first and then to A.

Probate where several Executors:—Where several executors are appointed by a will, probate can be granted to all of them *simultaneously* or at *different times*, *Sailabala Dasi v. Baidyanath Rakshit*, 92 C.W.N. 719 = A.I.R. 1928 Cal. 660 = 110 I.C. 542. Cf. *Re Nickolls*, 4 Sw. & Tr. 40; *Be Lesse*, 2 Sw. & Tr. 442. For the purposes of this section, it makes no difference, whether an executor is expressly appointed or appointed by necessary implication, *Re Durga Das Poorary*, cited at p. 423, *ante*. Probate may be granted jointly or severally as the executors apply singly or in conjunction with one another. But where one executor is granted probate there is nothing to prevent any other executor from proving the will, *Prannath v. Jadunath*, 20 All. 189; see also *Hara Cumar v. Durgamoni*, 21 Cal., 190, although the grant of probate to one enures to the benefit of all others. In the absence of any legal incapacity, probate should not be refused to an after-coming executor, *Ibid.* Vide also *Iswar Singh v. Barkishen Lal*, 84 P.W.R. 1915 : 29 I.C. 754; *Re Amrik Singh*, 42 P.L.R. 1913 : 110 P.W.R. 1913 : 18 I.C. 16. Where some of several executors take out probate, the right of the remaining executors to come and to apply for probate may be reserved, *Re Ardeshir Rustomji*, 27 Bom., 261; Cf. *Pearilal v. Bepin Behari*, 45 I.C. 336 (Cal.), in which it was held that if probate is obtained by some executors without citation upon others, the latter are entitled to apply for probate if not debarred under sec. 228. Probate might be granted to some of the executors while others stood by though called upon to join, 27 Bom. 281, *supra*. The words contained in a will, to the effect that the "five executors unanimously or by a majority" can do certain acts, do not affect the right of one or two executors to apply for a probate, which can be done under the law even if the other executors do not join in the application, *Hoi Chand, v. Natal Rai*, A. I. R. 1930 Sind, 91=121 I.C. 173. An executor is not an executor *appointed* if his appointment depends on a contingency, which has yet to happen. That is, a contingent executor is not entitled to the benefit of this section as regards coming afterwards. As the property vests in an executor apart from a probate (sec. 211) he can, even if he does not take out probate, call upon his co-executors, who have obtained the grant, for inventory and accounts, 27 Bom. 281. The whole underlying principle of this section is that the several executors are in the eye of law a single person. Notice that there is no express provision in the Act to issue citation on a sleeping co-executor at the instance of another co-executor applying for probate in the manner mentioned in sec. 229, *post*, yet one Court has held that if in an application by one of the executors, the Chief, executor is not cited, the proceeding is likely to be infructuous not being in order, *Umrao, Mal Losha, Re*, 1943 A.M.L.S. 27. This case should however be read with caution.

Substituted Executors :—This section does not apply when the will provides for the substitution of one executor by another in the event of the death of the first named executor. In such a case, the right of the substituted executor arises only upon the death of the first executor, *Mithibai v. Canji Kheraj*, 26 Bom., 671. This is virtually the case of a contingent executor, executorship maturing on the happening of the contingency.

Conflict among Executors :—An executor may successfully resist the title of his co-executor on the grounds of lunacy, idiocy or imbecility, but no such objection is allowable on the ground of bankruptcy or felony, as the Court considers itself powerless against the choice of the testator in the matter of selecting his executors, Cootes, 14th Ed. 190. The claim of one executor can be resisted by the other executors on the ground of his indebtedness to the estate, *Re Krishnanand Swami*, 1 A.L.J. 121. Unsuccessful opposition by one executor to the application by another executor on the ground of want of due execution of the will does not preclude the opposing executor subsequently applying for a grant himself, *Sailalala Dasi v. Baidyanath*, 32 C.W.N. 729 = A.I.R. 1928 Cal. 580 = 110 I.O. 542.

225. [Pro. S. 10 & Suc. S. 185]. (1) If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

(2) If different executors are appointed by the codicil, the probate of the will shall be revoked, and a new probate granted of the will and the codicil together.

Scope of the Section :—This section contemplates the discovery of a codicil after probate of the original will, and makes a two-fold provision, (1) if there be no revocation of the appointment of executors, then a separate probate of the codicil will be granted [sub-sec. (1)], but (2) if there be a revocation of appointment, then the original probate must be brought in and revoked, and a new probate granted of the will and the codicil together, [sub-sec. (2)]. See Cootes, 15th Ed. pp. 29 & 281; also *Re Roberts*, 3 P. & M. 110. Under sub-section (2), the original grant will be revoked and a separate grant made of the will with the codicil only if different executors are appointed by the codicil, see *Re Bailey*, L.R. 1 P. and D. 628. Otherwise, sub-section (1) will apply, and the original grant will be kept in tact and a separate grant will be made, in respect of the codicil. The Court will lean against revocation by inference and will be reluctant to exclude from probate the executors to whom the grant has already been made, *Re Lowe*, 3 Sw. & Tr. 478. Where the codicil in effect revokes the will, probate of the codicil cannot be granted until probate of the will has been revoked, *Sarajini Dassee*, *Re*, 45 C.W.N. 787.

Codicil:—Is a part of the will, *vide* sec. 2 (b); therefore, ordinarily it must be probated together with the will itself, see *Rai Kishori Dasi v. Debendranath*, 15 I.A. 87 : 15 Cal. 409. But where different testamentary documents exist, independently of each other and not constituting "one sole will," separate probates may be granted, *Re Mary Elizabeth Schenley*, 8 C.W.N. colxxiv. Cf. *Re Craig*, L.R. 1 P. & D. 72 ; *Grimwood v. Cozens*, 2 Sw. & Tr. 368. For instances of the construction of a codicil, *vide Deputy Commissioner v. Bijai Raj*, 20 O.C. 260 ; 4 O.L.J. 789 : 22 C.W.N. 805 : (1918) M.W.N. 324 : 8 L.W. 1 : 43 I.O. 987 (P.C.), and *Administrator-General v. Hughes*, 40 Cal. 192 : 21 I.O. 183. Probate of codicil should be obtained from the Court from which the probate of the will has been obtained, *Hales v. Peterson*, 1 L.R. (1941) 2 Cal. 1 = 45 U.W.N. 789 = A.I.K. 1941 Cal. 417 = 196 I.C. 111. Read notes under the heading, "Probate of Codicil" under sec. 276, *post*.

226. [Pro. S. 11 & Suc. S. 186] When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

A general of representation to surviving executor.

Survivorship among Executors:—Where several executors have obtained the grant of probate, on the death of one of them, the entire representation passes to the survivor. Thus, in *Barada Prashad v. Gajendanath*, 13 C.W.N. 557 : 9 C.L.J. 383 = 1 I.C. 289, the right to perform certain religious ceremonies conferred by the will exclusively on the executors passed on the death of one of them to the remaining executors, and was not transmitted to the heir of the deceased executor. Cf. *Flanders v. Clarke*, (1747) 8 Atk. 509 ; *Jacomb v. Ha:wood*, (1851) 2 Ves. (Sen.), 268.

Under this section, survivorship is the only rule recognised. English Law.

But under the English law, in such a case survivorship is not the invariable rule. Because, in England, an executor can appoint his own executor, and the executor's executor becomes the *derivative executor* of the testator. So, on the death of an executor, the derivative executor takes his place and the entire representation does not pass to the surviving executors. The effect of this section is to render this English principle of *derivative executorship* inapplicable in India, see *De Souza v. Secretary of State*, 12, B.L.R. 423 ; *Ramanatham Chetty v. Ragammal*, 17 M.L.T. 61 : 27 I.C. 849. It may here be incidentally mentioned that there is nothing in this section to preclude the testator himself from conferring authority on his executor to nominate his successor (*i.e.* a derivative executor), see *Ranjit Singh v. Jagannath*, 12 Cal., 375 ; *Parmanundas v. Venayek, Rao*, 7 Bom. 19 (P.C.). In *Bunchordas v. Parvatibai*, on the death of the sole executor, he was allowed to be represented in appeal by his own executor, who was in fact a derivative executor of the original testator.

227. [Pro. S. 12 & Suc. S. 188] Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

Effect of probate.

Language of the Section:—The language of the section seems to be defective. It says that probate of the will, when granted, establishes it from the death of the testator, that is, until the grant, the will is not established. This ought to be the meaning on a literal interpretation of the section, but is not in full consonance with the spirit of the sections 211 and 213, *supra*; because under sec. 213, a Mahomedan will need not be probated at all, notwithstanding the absence of a grant, the deceased's property vests in the Moslem executor under sec. 211. Besides, it has been held that there is nothing in the Act to prevent an executor from acting as executor and exercising powers under the Act, without obtaining a probate, *Ganapathi Iyer v. Sivamalas*, 86 Mad. 575 : 23 M.L.J. 806 : (1912) M.W.N. 1112 : 17 I.C. 4. Cf. *Girish Chandra v. Broughton*, 24 Cal. 861 (875). Thus, the so-called establishment does not really depend upon a grant. This inconsistent position has been explained away by interpreting the expression "establishes the will" in a particular manner, as meaning, "is conclusive proof of the genuineness of the will" or "is authenticated evidence of the will itself," see *Sherk Moosa v. Shaik Esa*, 8 Bom., 241—on appeal from *Fatima v. Sheikh Esa*, 7 Bom., 966. The Judicial Committee has recently pointed out that the object of the section is to get rid of multiplication of proofs, *Kadiyala Venkata Subbamma v. Katredas Ramaya*, 59 I.A. 112 = 55 Mad. 448 = 62 M.L.J. 365 = 55 C.L.J. 263 = 36 C.W.N. 441 = 84 Bom. L.R. 764 = 1932 A.L.J. 293 = 9 O.W.N. 201 = A.I.R. 1932 P.C. 92 = 186 I.C. 111 (P.C.). It really serves to make the forensic recognition implied in a grant to relate back to the time of the testator's death, *Gopal Lal v. Amulya Kumar*, 59 Cal., 911 = A.I.R. 1939 Cal. 234 = 142 I.C. 747 [N.B.—There are certain loose expressions in this case regarding the time of vesting which are inconsistent with the P.C. case of *Kadiyala Venkata*, and it should be cautiously read]. The effect of this section is not to make the vesting under sec. 211 or the power of disposal under sec. 207 in any way dependent upon the grant of probate, *Kadiyala Venkata Subbamma's case, supra*. The vesting dates from the testator's death and not from the date of the grant, *Ram Kali Kuer v. Kal'i Prosad*, A.I.R. 1947 Pat. 257 = 227 I.C. 570.

Effect of Probate:—This section has the double object (i) of establishing the will from the death of the testator, and (ii) of validating all the intermediate acts of the executor. Vide notes under the heading "Effect of Grant" at p. 420, ante. The probate is decisive only as to the genuineness of the will and the representative title of the executor, *Rama Chandra v. Ramalai*, 89 Bom. L.R. 165 = A.I.R. 1937 Bom. 341 = 170 I.C. 900. See also *Re Nanda Lal Set*, 55 C.W.N. 568 = 93 C.L.J. 190 = A.I.R. 1955 Cal. 88. [Probate is a judicial certificate that the will is the last will of the testator and has been regularly proved before the Court]. Read *Kashi Bai v. Golind Lal*, 52 C.W.N. 914. Unless the grant is obtained, the title of a person claiming under the will is not perfected, *Basanta Kumar v. Gopal Chandar*, 18 C.W.N. 1136 ; 26 I.C. 21. Vide also *Arunmoyi v. Mohendra Wadadar*, 20 Cal., 888 ; *Lalit Molan v. Radharaman*, 15 C.W.N. 1021 ; *Jagannath v. Ranjit Singh*, 25 Cal., 954. Obtaining probate of a will means,

nothing more than that the will was executed by the testator, *Bhabangana Debya v. Horendra*, 17 C.W.N. 445 (147) : 16 I.C. 48. Cf. *Matson v. Swifts*, 8 Beav. 268; *Kommullochun v. Nitrutton*, 4 Cal. 360 (362). A probate produces the effect Probate effective only contemplated by the section only when it is granted and when granted. actually issued; a mere order for probate will not do. Cf. *Mohamidu v. Pitchey*, (1894) A.C. 437; *Lakhya Dasya v. Umakanta*, 14 C.W.N. 256 = 2 I.C. 818.

Effect of Refusal of Grant—Refusal to grant probate for want of sufficient evidence is not conclusive in its effect, *Ganesh v. Ramchandra*, 21 Bom., 568; such a refusal does not show that the will is not genuine, *Ibid.* Cf. *Chinnasami v. Harihara*, 16 Mad. 380. A refusal to admit a Will to probate is conclusive of the facts necessary to support the decision. But if probate is refused not on the merits but merely by reason of the insufficiency of some matter of form or procedure there is no adjudication, and the will may be again propounded, *Ramani Debi v. Kumud Bandhu*, 14 C.W.N. 924.

Representation by Executor when begins:—Representation by the executor or his liability to be sued does not begin till he has (1) intermeddled with the testator's estate or (2) proved the will. Hence a judgment, passed against him till then, does not bind the testator's estate. Such liability may be excluded by subsequent renunciation of office as executor, *Lal Bihari v. Nogendra*, 22 C.L.J. 266 : 16 I.C. 690. An executor is not liable until he has accepted the position of an executor, and he cannot be said to have fully accepted that position until he obtains probate, *Lakhya Dasya v. Umakanta*, 14 C.W.N. 256 : 2 I.C. 818.

Validity of Intermediate acts:—The section validates all the intermediate acts of the executor before the grant of probate. As the estate already vests in the executor under sec. 211, it is rather difficult to follow why the Act should require such subsequent validation by means of a Probate. Cf. *Sarat Chandra v. Bhupendra*, 25 Cal., 103; read the notes at pp. 367 & 490, ante; also the following cases, *Kurutulain v. Pearly Saheb*, 33 Cal. 116; *Prosunno v. Kristo Chytuno*, 4 Cal. 342 (345); *Dhirendra v. Saradindu*, 1 C.L.J. 28(n); *Bai Harkor v. Manik' al*, 12 Bom., 621; *Jehangir v. Bai Kukibai*, 27 Bom., 281. As a matter of fact it has been held that there is nothing in the Act to prevent an executor from acting as executor and exercising powers under the Act without obtaining probate, *Ganapathi Iyer v. Shivamalai*, 36 Mad. 575 : 29 M.L.J. 306 : (1912) M.W.N. 1112 : 17 I.C. 4; *Kadiyala Venkata v. Katreddi Ramayya*, 59 I.A. 112 = 55 C.L.J. 268 = 36 C.W.N. 441 (P.C.). This is so because the grant is not the foundation of the executor's title, but is only an authenticated evidence of such title, *Pandurang Shamrao v. Dwarkadas Kallian Das*, 35 Bom. L.R. 700 = A.I.R. 1933 Bom. 342 = 146 I.C. 621. The executor may do all acts no doubt, but an explicit statutory clause recognising the validity of such acts is necessary to remove all possibility of technical

objections in Court regarding controversies relating to them. Cf. *Newton v. Metropolitan R. W. & Co.*, 1 Drew & Sm. 589; *Re Stevens*, (1897) 1 Ch. 422. Though the estate vests in the executor, and he can, before grant of probate, do all acts generally, still the representation of the estate by him before such grant is somewhat of an inchoate character, vide *Kolla Subramanian v. Thellanayakulu*, 4 Mad. 124; *Prosunno v. Kristo*, 4 Cal. 842; *Sankara v. Ramasami*, 20 Mad. 454; *Janaki v. Dharulal*, 14 Mad. 454; *Chunilal v. Osmand Bibi*, 80 Cal. 1044. The provision as to validation in this section is necessary for the protection of other people who deals with the executor. Thus, a person who in good faith derives title from an executor at a time when the probate was in force is not affected by the subsequent revocation of the probate. *Gobinda Mohan v. Mayatunessa Bibi*, 7 I.C. 9 (Cal.), —following 85 Cal. 955, P.C.; *Naogi v. Naogi*, A.I.R. 1938 Rang. 43—174 I.C. 186; *Ma Thein v. Nepean*, 8 Rang. 463 — A.I.R. 1931 Rang. 15—128 I.C. 359; read also the notes under the heading, "Sale under void grant" under sec 297, post, and those under the heading, "Effect of Revocation" under the sec. 263.

Effect of subsequent revocation of Probate. But the validity of the acts depends on the validity of the probate. So where the probate itself is invalid it cannot validate the acts. Thus, the acts done by the executor on the strength of a will which is found to be forged, are void, *Pundit Prayrag Raj v. Goukaran Pershad*, 6 O.W.N. 387. So long as the probate exists, that is, is in force and is not revoked, it can validate the acts, *Komollochun v. Nilruttun*, 4 Cal. 360; *Haripriya Dassi v. Sarat Chandra*, 2 O.W.N. xxii.

Validity of the acts depends of the validity of the probate.

Probate as Evidence of the Will and its due execution:—It is conclusive evidence of the validity and contents of the will, as well as the validity of the executor's appointment, *Sheik Moosa v. Sheik Essa*, 8 Bom. 241; *Maston v. Swifts*, 8 Beav. 368; *Grish Chunder v. Broughton*, 14 Cal. 861 (1875); *Lalit Mohan v. Radharaman*, 15 C.W.N. 1021: 13 C.L.J. 547; for conclusiveness of the contents of the will, vide *Hormusji v. Bai Dhanbaiji*, 12 Bom., 164. For other cases as to the grant being conclusive regarding the factum of the will, vide *Komollochun v. Nilruttan*, 4 Cal. 360; *Umanath v. Nelmoney*, 6 Cal. 429; *Brajanath v. Anandamoyi*, 8 B.L.R. 208. The grant is conclusive as to the due execution of the will, *Whicker v. Hume*, 7 H.L.C. 124. It is decisive only as to genuineness of the will propounded and of the right of the executor to represent the estate, *Bal Gangadhar v. Sakwarbai*, 26 Bom., 792. As a matter of fact, "nothing but the probate or letters of administration with the will annexed is legal evidence of the will" in all questions of representation, *Pinney v. Hunt*, 6 C.D. 100. Cf. *Janaki v. Dhanu Lal*, 14 Mad., 454; *Ameer Chand v. Mohanund Bibi*, 6 C.L.J. 453. An order passed by the Original Side of the High Court on an originating summons that a document can be probated is no valid substitute of a Probate granted by a Probate Court. *Elizabeth Anna v. Official Trustee*, 52 C.L.J. 475 — A.I.R. 1931 Cal. 188—130 I.C. 217.

As Evidence of Representative Title :—The grant is conclusive evidence of the representative title of the executor, *Girish Chandra v. Broughton*, 14 Cal., 861 (876); *Hormusji Navorji v. Dosabhai*, 12 Bom., 164. *Griffiths v. Hamilton*, 12 Ves. 298; *Allen v. Dundas*, 3 T.R. 125. Also *vide* notes under the last paragraph; and sec. 41 of the Indian Evidence Act; *Concha v. Concha*, 11 A.C. 541, *Bailey v. Harris*, 18 L.J.Q.B. 115. Cf. 4 C.W.N. clxxvi; 31 Cal., 857; 14 Cal. 861, 16 Mad. 880 (883); 26 Bom., 792.

Probate is no evidence of Disposing Power or Validity of Bequests :—As it is not the province of a Probate Court to go into questions of title, (*vide* notes at p. 408, ante), a probate grant is no evidence of the disposing power of the testator or of the validity of a bequest. See *Bhabangana Debya v. Harendra*, 17 C.W.N. 454 (447); 16 I.C. 48; *Nishikanta v. Ashutosh*, 17 C.W.N. 613; *Chintaman v. Ramchandra*, 34 Bom., 589; *Lalit Mohan v. Radharaman*, 15 C.W.N. 1021; 13 O.L.J. 647; *Venkata Chala Mudaliar v. Vedagiri Mudaliar*, A.I.R. 1927 Mad. 782—102 I.C. 841; *Ram Chandra v. Ramabai*, 39 Bom. L.R. 165 = A.I.R. 1937 Bom. 341—170 I.C. 960. The Probate Court does not decide any question of disposing power of the testator, *Bal Gangadhar v. Sakwarbai*, 26 Bom., 792. Cf. *Behary Lal v. Juggo Mohun*, 4 Cal. 1; *Abhiram v. Gopal*, 17 Cal. 48, or of the testator's title or of the existence of the property, *Elizabeth Egbert v. Fantone*, 1950 A.L.J. 622. The Probate Court cannot decide whether the property is joint or separate, *Roghunath v. Pute Koer*, 6 C.W.N. 345; Cf. *Ochavaram v. Dolatram*, 28 Bom., 644; *vide* also the cases cited at pp. 408, 419, ante. Also *Arunmoysi v. Mahendra Wadadar*, 20 Cal. 888.

Evidentiary Value of Probate :—The judgment of a Probate Court granting or refusing a probate is a judgment *in rem* [*Chinna Sami v. Harihara*, 16 Mad. 860] and binds parties other than the actual litigants before the Court, *Jaswant Lal v. Goverdhan Lal*, A.I.R. 1937 Lab. 804—169 I.O. 541; and is under sec. 41 of the Indian Evidence Act, conclusive as to the legal character it confers. It has the force of a decree with respect to matters which the Probate Court is competent to decide, Cf. *Komollochun v. Nilrutton*, 4 Cal. 360, and operates as a *qui estoppel*, *Sharo Bibi v. Baldeo*, 1 B.L.R. 24. Cf. *Rajib Panda v. Lekhan Sendh*, 27 Cal. 11 (22). The decision of a Probate Court is not *res judicata*.

on the question of relationship of the parties with the deceased, *Lalit Mohan v. Radharaman*, 15 C.W.N. 1021; 13 O.L.J. 647; nor with respect to any matters not within the competency of a Probate Court to decide. Cf. notes under the last paragraph. Cf. *Jagannath v. Ranjit*, 25 Cal. 854; also 20 Cal. 888; 21 Bom., 568; *Ramani Debi v. Kumud Bandhu*, 14 C.W.N. 924. Cf. *Chintaman v. Ramchandar*, *supra*; *Thakurain Lekhraj v. Thakur Harpal*, 16 C.W.N. 217; 15 O.L.J. 72. It does not conclude the parties on the question of conflicting claims to the property, *Ganesh v. Ramchandra*, 21 Bom., 568; *Arunmoysi v. Mahendra Wadadar*, 20 Cal. 888; *Jagannath v. Ranjit Singh*, 25 Cal., 854.

228. [Pro. S. 5 & Suc. S. 180] When a will has been proved and deposited in a Court of competent Administration with jurisdiction situated beyond the limits of the State, copy annexed, of authenticated copy of whether *within or beyond the limits of India*, and a will proved abroad. properly authenticated copy of the will is produced letters of administration may be granted with a copy of such copy annexed.

Object and Scope of the Section :—The object of the section is to dispense with the production of the original will if in deposit in some other Court. The section is merely an enabling section and if the Court considers necessary to decide any question relating to the validity of the will, such as the power of the testator to make a will etc, it has to try that question before enabling the executor to act under the will, *Ram Lal v. Chanan Das*, I.L.R. 1938 Lah. 562-40 P.L.R. 1064-A.I.R. 1938 Lah. 349-178 I.C. 224.

Administration with copy of Will proved abroad or outside State—If a will has already been proved and deposited in a foreign Court (or an extra-State Court) of competent jurisdiction, a Court here (i.e. in the State concerned) will grant letters of administration with an authenticated copy of such will annexed, *Bhaura v. Lakshmisbai*, 20 Bom., 607; *Manasing v. Amad Kunhi*, 17 Mad. 14; *Ram Lal v. Charan Das*, I.L.R. 1938 Lah. 562-40 P.L.R. 1064-A.I.R. 1938 Lah. 349-178 I.C. 224; *Re Laurence Claude*, (1954) 2 M.L.J. 249-A.I.R. 1954 Mad. 898 [dealing with the scope of the Section]. Thus, a French subject of Chandernagore executed a will. On his death a general legatee applied to the Court at Chandernagore for having the Will deposited according to the French law. After the usual proceedings were taken the French Court recognised the will and made it over to a Notary with power to give copies to the parties. The trustees under the Will applied to the District Judge of Hughli for letters of administration with a copy of the Will annexed; held, this section does not require that the will should have been deposited once and remain in Court for all time. The fact that the will was deposited in the French Court and the Court had before it the original will at the time it made a judicial pronouncement as to the validity of the Will under the French law was a sufficient deposit within the meaning of this section, and that the French Court having so provided, a copy authenticated by the notarial seal was a properly authenticated copy under this section. *Shu-hilakala v. Anukul Chandra*, 22 C.W.N. 713: 44 I.C. 166. The section requires two things to be proved: (1) That the will has been proved and deposited in a competent Court abroad, (2) that the document produced before the local Court is an authenticated copy of the Will so proved and deposited, *Sidney Thomas, Esq. v. I.L.R. (1945) 2 Cal. 572-A.I.R. 1949 Cal 560*. For English cases relating to the matter, see *Miller v. Jones*, L.R. 3 P. & D. 4: *Es Smith*, 16 W.R. (Eng.) 1110; Cf. sec. 254, *post*; *Re Estate of Levy* 1908 P. 108; *Es Trefend*, 1899 P. 247; *Murphy v. Deichler*,

(1909) A.C. 446. *Vide* also Coote's 15th Ed. p. 57, *Et seq.* An executor who has proved the will abroad need not come to India for taking out letters of administration; he may take out a grant in this country through an attorney, (i.e. an agent empowered by a power of attorney). *Mo Cankia, Re*, I.L.R. (1940) Mad. 820 = (1940) 1 M.L.J. 264 = (1940) M.W.N. 160 = 51 L.W. 219 = A.I.R. 1940 Mad. 680 = 192 I.C. 981. [Read the notes under sec. 241, *post*]. Read also *Re Reginald Philip*, 1954 Ker. L.T. 998 = A.I.R. 1955 Trav.-Co. 102; *Re Adwait Nath Sil*, 1948 A.L.J. 336 = A.I.R. 1948 All. 351 (F.B.)—cited also under sec 241, *post*. A judge before granting letters of administration hereunder should satisfy himself that all the conditions hereof have been complied with. A mere statement of a pleader for the applicant that the will was proved in French India according to the law in force there is not sufficient when there is no evidence to show that the will was proved in a Court of competent jurisdiction in French India. *Bamapada Ghose v. Satis Chandra Sur*, 76 O.L.J. 107 = A.I.R. 1943 Cal. 285 = 206 I.C. 580. The word, "proved" is not necessarily the equivalent of "admitted to probate"; it means authoritatively established as being valid according to the law of the place where it was made. *Sukumar Banerji v. Rajeshwari Debi*, I.L.R. (1938) 2 Cal. 607 = A.I.R. 1939 Cal. 237 = 182 I.C. 596.

Competent Jurisdiction :—Before granting administration under this section, the Court must be satisfied that the will in question has been *proved* and deposited in a foreign Court of Competent jurisdiction; *Re Derahs*, 34 L.J.P. & M. 58; *Wms. on Executors*, 10th Ed. p. 272. The word "proved" implies that the will is *valid* according to the law of the country of the testator's domicile, *Ibid*; *Comp. Bamapada Ghose v. Satis Chandra Sur*, 76 O.L.J. 107 = A.I.R. 1943 Cal. 285 = 206 I.C. 580; also A.I.R. 1954 Mad. 898, cited above.

Authenticated Copy :—In order to obtain letters under this section, an authenticated copy of the will (deposited in a foreign Court) is necessary. *Bamapada Ghose v. Satis Chandra Sur*, 76 O.L.J. 107 = A.I.R. 1943 Cal. 285 = 206 I.C. 580. As to what will be proper authentication under this section, *vide Sushilalala's case, supra*. The copy must be one admissible under the Indian Evidence Act, that is, the copy must purport to be a copy made from the original and must bear certificate to the effect that it has been compared with the original. See sec. 63 of the Indian Evidence Act; *Re Adam Whyte*, 14 Bur. L.R. 88. The effect of such authentication is to enable the Court to dispense with the necessity of proof of the original will. In absence of authentication the original will has to be proved, according to the law of the testator's domicile, if the Property is moveable; and according to this Act, if the property is immoveable. *Bhaura v. Lakshmi Bai*, 20 Bom. 607.

Probate of a Foreign Will :—Probate of the will of a person domiciled abroad though not proved in the place of domicile may be granted in British India, if the

will is valid according to the law of the place of domicile and if there are assets in British India. *Soona Mayna v. Soona Nevena*, 20 C.W.N. 893 (cited at p. 422, *ante*). P.C. Cf. *Re Smith*, 16, W.R (Eng.) 1180: the foreign law may be proved under sec. 45 of the Indian Evidence Act, by means of expert opinion. Such opinion can be taken by means of the expert's affidavit.

Exemplification :—Is the technical name for a properly authenticated copy of the will referred to in this section, see *Re Gubboy*, 4 C.W.N. vii (7); *Re Newton*, 8 B.L.R. App. 76. For form of EXEMPLIFICATION, *vide* APPENDIX. See also Belchamber's Rules and orders, pp. 307-311.

Probate of Foreign Court :—Does not create any representative title under this Act unless it is followed by a grant from an Indian Court; *vide* notes *supra*. Thus, where a plaintiff produced only a copy of a probate issued by a native Court, certified by its political agent, the Court held that the suit was liable to be dismissed in absence of representation in India under this section, *Manasing v. Amad Kunhi*, 17 Mad. 14.

Affidavit of Valuation :—An application under this section is not required to file an affidavit of valuation in the form set forth in Sch. III of the Court Fees Act, *Deputy Commissioner v. Jagadish Chandra*, 2, Pat. L.T. 688 : 62 I.C. 513.

Duty of Court under this Section :—A Judge before granting letters of administration under this section should satisfy himself that all the conditions laid down herein have been complied with. A mere statement of a pleader for the applicant that the will was proved in French India according to the law in force there is not sufficient when there is no evidence to show that the will was proved in a Court of competent jurisdiction in French India, *Bampada Ghose v. Satish Chandra Sur*, 76 C.L.J. 107 = A.I.R. 1943 Cal. 285 = 206 I.C. 680.

Letters of administration to an attorney of absent executor proving will abroad :—By reason of the combined operation of this section and sec. 241, an attorney of an absent executor who has proved and deposited a will abroad can obtain a grant of letters of administration with a copy of the will annexed by producing an authenticated copy of the will proved and deposited as above, *Sidney Thomas. In re*, I.L.R. (1945) 2 Cal. 572 = A.I.R. 1949 Cal. 660; *Adwait Nath Sil. In Re*, I.L.R. (1948) All. 611 = 1948 A.I.J. 386 = A.I.R. 1948 All. 361 = 3 D.L.R. (All.) 24 (F.B.).

229. [Pro. S. 16 & Suc. S. 193] When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been

Grant of administration
where executor has not
renounced.

issued, calling upon the executor to accept or renounce his executorship :

Provided that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

Grant of Administration upon non-acceptance of Executorship:—An executor may not accept his office, and there is nothing in law to compel him to accept, *Rex v. A. Stock*, 54 All. 605—1932 A.L.J. 363—A.I.R. 1932 All. 384—187 I.O. 201; *Jnanendra Nath v. Jitendranath*, 92 O.W.N. 108—A.I.R. 1928 Cal. 275—107 I.C. 70. Cf. *Mardaunt v. Clarke*, 1 P. & M. 592; *Goods of Feth*, 2 Sw. & Tr. 126; *Re Tulsidas Varajdas*, 20 Bom., 227. But where the executor neither accepts nor renounces his office, administration can be granted to some other person, *Surejina v. Rajlakshmi*, 47 Cal. 838 : 60 I.C. 974, and then the procedure to be followed is to issue citation upon the executor calling upon him either to accept or to renounce his office, and if he does not respond, to grant administration to a proper person, within the meaning of secs. 218 and 219, *supra*. Cf. *Lakshmi Sankar, Re*, 16 Luck, 454—1941 O.W.N. 653—A.I.R. 1941 Oudh. 298—194 I.O. 227 (F.B.). The Sind Court has held distinguishing 47 Cal. 838, that the section refers to the grant of letters of administration and not the grant of Probate, *Hochand v. Natalrai*, A.I.R. 1950 Sind, 91—121 I.O. 173. Cf. (1955) 2 M.L.J. 657. Mere failure of an executor to appear in Court in pursuance of the citation issued to him does not amount to his renunciation of the executorship. Such omission to appear may amount to renunciation in England, but not in India, *Raghutai Dial v. Gadodia*, A.I.R. 1928 Lah 470—110 I.O. 506. An executor who disputes the validity of a will must accept or renounce the executorship before the validity of the will is adjudicated upon on an application for letters of administration by another person, *Lakshmi Sankar, Re, supra*.

Proviso

The Proviso dispenses with citation in the case where the survivor of the executors (proving the will) has died ; Cf. *Harrison v. Harrison*, 1 Rob. 406; *Venables v. E. I. Co.*, 2 Exch. 683; the executors who have not proved need not be cited in the contingency contemplated by this proviso. As to what is not renunciation, read the notes under the next section. For the position of an executor not accepting office, read A.I.R. 1960 Punj. 231.

Citation:—A citation is practically a *command* on the person cited to do some particular act. Such act under this section is either to accept or to renounce the executorship. Cf. *Ackerly v. Parkinson*, 3 M. & S. 411. Under the Calcutta Testamentary Rules (Rule 9), citation should be issued upon all persons having prior claims under secs. 218 and 219. With respect to the property of a prostitute, citation should be issued on the Government Solicitor, (*vide* Rule 11); *Harilal*

v. *Tripura Charan*, 40 Cal. 651 : 17 C.W.N. 679 : 17 C.L.J. 488 (F.B.) For the form of a citation, *vide APPENDIX*. Citation under this section is *compulsory*, so that in absence of such citation, the grant of administration has to be revoked, *Digambar v. Narayan*, 19 Bom. L.R. 38 ; *Hormusji v. Dhanbaiji*, 12 Bom. 166. Cf. sec. 268. For instances of citations, see *Madhab Chunder v. Bhayaram*, 22 Cal. 92 ; *Sarojini v. Raj Lakshmi*, 47 Cal., 838 : 60 I.C. 974 (in this case citation was issued calling upon the executor to attend and to watch) ; *Motibai v. Karsandas*, 19 Bom., 123 ; *Dayabhai v. Damodardas*, 21 Bom. 75 ; 22 Bom. 227 ; the section does not say within what time the executor is to elect. It seems the Court should give him a reasonable time. If the executor elects to accept office, he may be compelled to take out probate within a limited time and in default, the letters can be issued to other persons hereunder. See sec. 231 ; *Kavaji v. Bai Dinali*, 40 Bom., 666 : 18 Bom. L.R. 766 : 86 I.C. 378. The section is again silent as to the mode of service. Cf Order V of C.P. Code. In England citation by advertisement is permissible in cases of non-traceable parties or parties going to a foreign country, *Kenworthy v. Kenworthy*, 82 L.J.P & M. 107. Under the English law Compelling executor on pain of contempt when it is too late for an executor to renounce, he having once elected to act as such, he may be cited to take probate and his disobedience will amount to a contempt of Court, *Jnanendra Nath v. Jitendra Nath*, 32 C.W.N. 108 = A.I.R. 1928 Cal. 275 = 107 I.C. 70.

The section simply makes issue of citation a condition precedent to a grant, but does not propose to penalise non-issue of citation by rejection of the petition for a grant. The petitioner should have a chance for rectifying his omission to pray for citation and the Court may even proceed *suo motu* in the matter of citation realising the costs for the purpose from the petitioner on pain of rejection of his application, *E. J. John v. Collector of Malabar*, I.L.R. (1944) Mad. 658 = (1945) 2 M.L.J. 698 = 1943 M.W.N. 786 = A.I.R. 1944 Mad. 189 = 215 I.C. 8.

The section speaks of grant of *administration* and not of *probate* at the instance of a co-executor and therefore questions of non-citation and renunciation do not really arise in such a case, but in one case non-citation of a co-executor has been considered to render a probate application infructuous, *Umrao Mal Lodha, Re*, 1942 A.M.L.J. 27. Read the notes under sec. 224, ante.

Any other person :—Must necessarily mean a person with an inferior status than that of an executor.

230. [Pro. S. 17 & Suc. S. 194] The renunciation may be made orally in the presence of the Judge or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter

applying for probate of the will appointing him executor.

Form of Renunciation of Executorship:—The renunciation may be made (1) orally in the presence of the Judge, (2) by writing signed by the person renouncing. Renunciation must be absolute and not partial, *Broke v. Haymes*, L.R. 6 Eq. 25; Cf. *Re Smith*, (1904) 1 Ch. 139. Oral renunciation outside Court does not mean much, *Thoppai Venkataramiar v. Govindarayalier*, 23 L.W. 462—1926 M.W.N. 328 = A.I.R. 1926 Mad. 605—94 I.C. 78. It is only the renunciation in Court that decides the executors' fate, *ibid*. If the renunciation is made orally it must be in the presence of the Judge. 'Judge' here is the Judge of the Probate Court having seisin of the probate or administration proceeding, *Raghubar Dial v. Gadodia*, A.I.R. 1928 Lah. 470—110 I.C. 506. In the case of a written renunciation all that is necessary is writing, although such writing need not be in Court, *Gnanamamani Nadathi v. Esunadan*, A.I.R. 1928 Mad. 797—110 I.C. 489. A renunciation made in writing need not be addressed to the Court; if the renunciation in writing bears the signature of the renouncer, that is enough, *Gadodia v. Raghubar Dayal*, A.I.R. 1931 Lah. 746—133 I.C. 286. The section requires that the writing embodying the renunciation should be signed by the renouncer; it does not require the entire memorandum to be in his hand writing. A statement recorded by the Judge and signed by the person renouncing fulfils the requirement of the statute, *Raghubar Dial v. Gadodia*, A.I.R. 1928 Lab. 470—110 I.C. 506. Renunciation may be by means of a letter to the Judge, *Broker v. Charter*, Cro. Eliz. 92; *Re Boyle*, 3 Sw. & Tr. 426. There is no particular form of renunciation; and it need not be addressed to any body, *Raghubar Dial v. Gadodia*, *supra*. For renunciation through agent, see *Re Rosser*, 3 Sw. & Tr. 490. Renunciation must be actual and without reservation; mere consent to grant to another is not such renunciation, *Garrad v. Garrad*, L.R. 2 P & D. 328. Renunciation of executorship can be made by the executor without issue of citation, *Brojolal v Sharajubala*, 51 Cal. 745; A.I.R. 1924 Cal. 864. Non-joinder with the other co-executors in the application for probate or disputing the genuineness of the will on a previous occasion is no renunciation and does not disqualify an executor from obtaining grant of probate on a subsequent occasion, *Sailabala Dasi v. Baidyanath Rakshit*, 32 C.W.N. 729 = A.I.R. 1928 Cal. 580—110 I.C. 542.

Effect of Renunciation:—The renunciation precludes the executor for ever from applying for probate again; but he may subsequently obtain a grant *de bonis non*; *Re Makhan Brahmani*, 8 C.W.N. cxxxxv (235). But if the renunciation is timely withdrawn, or if the renunciation is not in conformity with this section, the executor will not forfeit his rights, *vide* notes under the next paragraph, as also *Sailabala Dasi v. Baidyanath*, *supra*.

When Renunciation is complete:—A statement expressly declaring refusal to accept the responsibility of executor duly signed by him and recorded by the Court

is sufficient to effectuate a renunciation, *Gadodia v. Raghubar Dayal*, A.I.R. 1931 Lah. 746 - 133 I.C. 286. Renunciation is not complete or final until it is recorded by the Judge, *Long v. Symes*, 3 Hagg. 775, and grant is made to another person. *Re Golap Sundari*, 5 U.W.N. clv, and till then it is open to the executor to retract the renunciation, and ask that probate might be granted to him, *Ibid.* There is no renunciation if it is retracted, *Re Maniklal Seal*, 35 Cal., 156. Cf. *Re Gill*, L.R. 3 P. & D. 118; *Re Morant*, L.R. 3 P. & D. 151; *Re Badmach*, 3 Sw. & Tr. 465; *Re Stiles*, 1898 P. 12; but see *Official Trustee v. Kumudini*, 37 Cal. 387. Retraction is not permissible after the grant has been issued to another person, *Hare Ram v. Ram Singh*, 27 C.W.N. 255 : A.I.R. 1923 Cal 444 : 75 I.C. 218. Cf. *Brijlal v. Sharajubala*, 51 Cal. 745 ; A.I.R. 1924 Cal. 864, which has been followed in *Raghular Dial v. Gadodia*, A.I.R. 1928 Lah. 470 - 110 I.C. 506. According to this last cited Lahore case, the English practice of allowing retraction of renouncement by an executor need not be followed in India and renunciation by an executor *de son tort* is not invalid. Retraction not being allowable, the renouncing executor is not any more entitled to probate, *Gadodia v. Raghubar Dayal*, A.I.R. 1931 Lah. 746 - 133 I.C. 286. Calling in question the genuineness of the will and at the same time expressing readiness to act as executor in the event of the will being found to be genuine, is no renunciation, *Thoppai Venkataramier v. Govinda Rayalier*, 1926 M.W.N. 323 - 28 L.W. 462 - A.I.R. 1926 Mad. 605 - 94 I.C. 73.

No question of renunciation in relation to administrator:—The word "renunciation" in the section means the renunciation of executorship contemplated by the preceding section. There is no section in this Act which lays down as to when and why an administrator can renounce his office. Of course, no one is bound to accept office against his will. The English Law as to renunciation by an administrator may be applied in those Presidency-towns where the same has been made applicable. Under that law an administrator renouncing the administration can not retract such renunciation except for good reasons, *Re Manchersha Dumarid*, 58 Bom. 172 - 30 Bom. L.R. 1666 - A.I.R. 1928 Bom. 88 - 119 I.C. 402.

* No Renunciation after acceptance of office:—An executor cannot renounce his office after once having accepted it *Ayerabai v. Ebrahim*, 32 Bom., 364. Renunciation after acceptance of office is void, *Ibid.*; *Goods of Veiga* 32 L.J.P. & M. 9. According to some opinion intermeddling with the testator's estate is tantamount to acceptance, *Ayeshalati's case, supra*; *Jnanendra Nath Mukherji v. Jitendra Nath*, 32 C.W.N. 108 - A.I.R. 1928 Cal. 275 - 107 I.C. 70. But see *Brijlal Banerji v. Sharajubala*, 51 Cal. 745 : A.I.R. 1924 Cal. 864, where it has been held that renunciation by executor is not rendered invalid by his having intermeddled with the estate of the deceased, following (1894) A.C. 497 (*supra*). This view has been followed in Lahore; [*Raghubar Dial v. Gadodia*, A.I.R. 1928 Lah. 470 - 110 I.C. 506]. But see *Keshar Singh v. Indar Singh* 6 Lah. L.J. 454 ; A.I.R. 1924 Lah. 548;

Effect of acceptance of Executorship. 76 I.C. 172. After acceptance of the executorship, the executor is bound to conform to the provisions of Chapters VI, VII, VIII and XIII of Part IX of the Act and to act with the ordinary care and the prudence of a diligent business man. He must make the fund productive and in order to do this he must invest the money in some form of security. If he fails to do so he will be liable for the consequent loss, *Rex v. A. Stock*, 54 All 605—(1932) A.I.J. 363 = A.I.R. 1932 All. 384 = 137 I.C. 201.

Discharge of Executor:—The Court has power to discharge an executor on his own application, *Re Amritchand*, 29 Bom., 188.

231. [Pro. S. 18 & Suc. S. 195] If an executor renounces, or fails to accept an executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration, with a copy of the will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

Failure to accept Executorship within the time limit:—If an executor renounces or fails to accept an executorship within the time fixed by the Court for his election, administration will be granted to the person who is entitled to it upon intestacy. The time is fixed by the notice of citation, *Motibai v. Karsandas*, 19 Bom. 128. Cf. *Re Mordant*, I.R. 1 P. & D. 592. Failure to accept after notice will entitle the Court to grant administration to other persons, *Ibid*. Where the executor after citation intimated to the Judge that in his opinion, probate was not necessary and that he had already applied for Succession certificate, it was held that application for succession certificate was not equivalent to acceptance of executorship and administration could be granted as on intestacy, *Motibai v. Karsandas, supra*. As to the effect of acceptance of office, see *Stiles v. Guy*, 4 V. & C. Ex. 571; *Re Marsden*, 26 Ch. D. 283. An executor called upon by citation to accept or renounce is compellable if he accepts to take out probate within a limited time, otherwise Letters of Administration will be granted to any competent applicant, *Kavaji v. Bai Dinbai*, 40 Bom. 666 : 18 Bom. I.R. 766 : 36 I.C. 878. As regards the rights of parties to administration as in case of intestacy, *vide* secs. 218 and 219, *supra*.

232. [Pro. S. 19 & Suc. S. 196] When—
Grant of administration
to universal or residuary
legatees.

- (a) the deceased has made a will, but has not appointed an executor, or

- (b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or
- (c) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

Grant of Administration to Universal or Residuary Legatee:—This section deals with the question of grant of letters of administration with the will annexed to the universal or residuary legatee, and lays down the conditions under which such a grant can be made. They are as follows: (a) when no executor is appointed, (b) when the appointed executor is legally incapable or refuses to act or dies before the testator or before proving the will, (c) when he dies after the probate but before administering the estate. Universal legatee.

A universal legatee is a person to whom the *entire* estate is bequeathed [see *Ramrani v. Indhani*, 1942 O.W.N. 452—A.I.R. 1942 Oudh, 510—205 I.C 361] and a residuary legatee is one to whom the residue of the estate is bequeathed. Vide sec. 102, *supra*,

and notes at pp. 202-203, *ante*; read also *Chhali Bai v. Chunnia Bai*, A.I.R. 1935 Nag 239 (cited there); read also *Sarat Chandra v. Panchanan*, A.I.R. 1953 Cal. 471.

Neither of them is entitled to probate but only to letters of administration with the will annexed, *Pundit Prayrag Raj v. Goukaran Iershad*, 6 C.W.N. 787; *Re Soshee Bhusan*, 19 Cal., 582. As to the establishment of the legatee's right by means of letters of administration, see sec. 219, *supra*. Vide also *Gordhandas v. Bai Ram Coomar*, 26 Bom., 267. For the purposes of this section it will be within the competence of a Probate Court to constitute the will and to decide whether an universal or a residuary legatee is really so, as to be entitled to the letters hereunder. *Bhupati Charan v. Chandi Charan*, 39 C.W.N. 390—A.I.R. 1935 Cal. 151—156 I.C. 241. Thus, where on a construction of the will the Court holds that a prior legatee takes an absolute interest, the gift over will not take effect and the donee of such subsequent gift will not have any *locus standi* to apply for the letters hereunder, *Ibid.* If the universal legatee is appointed an executor by implication under sec. 222, *supra*, he can obtain a probate. In *Re Radhika Mohun Set*, 7 B.L.R. 663, no executor being appointed by the will, the executrix was regarded as appointed by implication, and the probate was granted to her. But this case was not followed in *Soshee Bhusan's* case, 19 Cal., 582, *supra*, in which the universal legatee was held entitled only to administration and not to probate. See also *Rajaninath v. Ramanath*, 8 O.W.N. 488; *Ananda Vinayak v. Administrator-General*, 20 Bom., 450; *Arunmoyi v. Mohendra Wadadar*, 20 Cal., 888; *Chandra*

Kishore v. Prasanna Kumari, 8d Cal. 327 : 19 C.W.N. 864 ; *Re Knott*, (1920) 2 I.R. L. 397. Before Letters can be granted with the will annexed, there must be strict proof of the execution of the will, *Kuppammal v. Ammani Ammal*, 22 Mad., 345 ; *Ameer Chand v. Mohanund Bibi*, 6 C.L.J. 459. It should be noticed that all the sub-clauses in the section point to the absence of an executor. A legatee cannot be allowed to administer the estate if there be a legally capable executor willing to act, *Kariman v. Masila*, 29 P.W.R. 1912 : 24 P.L.R. 1912 : 18 I.C. 171. For this reason, a legatee is not allowed to raise the question of the executor's fitness, so long as the executor is not legally incapable. *Vide Ibid.* A legatee has however a right to be made a party to a probate proceeding in order to be able to protect his own right in the estate, *Ibid.* The word "will" in the section does not mean the original document but has been obviously used to mean the disposition, *Sarat Chandra v. Golup Sundari*, 18 C.W.N. 527 : 21 I.C. 121—approved in *Profulla Narayan v. Purnendu Narayan*, 2 D.R. 99. The words "estate of the deceased" make it clear that no grant hereunder is possible in respect of an endowed property for a religious purpose, *Narain Singh v. Keshar Singh*, 1941 A.M.L.J. 42 ; read the notes at p. 86, ante.

The words "so much thereof as may be unadministered" in the final part of the section apply only to Clause (c) of the section and not to the preceding clauses (a) and (b); and "administration" in this section means administration under the authority of the Court, *Khutchand v. Motilbai*, 30 S.L.R. 201 = A.I.R. 1936 Sind., 150 = 165 I.O. 202. An administration for grant Administration of the whole estate and Court fee paid accordingly.

of letters of administration under this section should be of the whole estate. A petitioner hereunder has no right to apply for the administration of a part only, or just so much of the property as suits his purpose. A grant under this section is not of the type of limited grants contemplated by Chapter II of Part X of the Act including sec. 268 (Grant *de bonis non*) but is like grants under all other relevant sections of the Act and is consequently governed by sec. 19-I and other cognate provisions of the Court-Fees Act with the result that the application must be in respect of the whole estate and Court-fee must be paid on all the properties of the deceased, *Ibid.*

As to who will not be regarded as a universal legatee, read *Sarat Chandra v. Panchanan*, A.I.R. 1958 Cal. 471. An assignee from an executor who has not obtained probate, will not come within the scope of the expression or the section, see *Laxmibai v. Viswanath*, 1958 M.P.L.J. (notes), 71.

Reason of Preference of Residuary Legatee :— In the matter of administration, the residuary legatee is given a preference over the other legatees and the next-of-kin, for this simple reason that being entitled to the surplus after satisfaction of every other claim, he is most vitally interested in the strict and jealous adminis-

tration of the estate. Cf. *Repington v. Holland*, 2 Lee, 256. Besides he seems to be the testator's "choice" and therefore the next person to the executor. This is the other reason for his preference, *Atkinson v. Lady Anne*, 2 Phill. 817. Cf. *Hutchinson v. Lambert*, 3 Add., 27; *Sawbridge v. Hill*, 2 P. & D. 219.

Representative of Universal Legatee—Locus standi of—to apply for letters of administration:—None of the provisions of this Act provide for the representative of a universal legatee being admitted to prove the will and apply for the grant of letters of administration with the will annexed, *Sulchhana Devi v. Mt Puranyaya*, A.I.R. 1948 Pat. 419. Comp. 1958 M.P.L.J. (notes) 71—cited above.

Clause (b): "Legally incapable":—The expression refers to cases of minority, lunacy, absence and the like. It does not refer to a disqualified proprietor, who is not therefore deprived by this section of his right to obtain a grant, if not a minor or a lunatic. *Bhagawati Koer v. Bahuria Itam*, 1920 Pat. 187; 5 Pat. L.J. 347; 1 Pat. L.T. 304: 67 I.C. 580.

Executor dying before proving the will:—In such a case, the probate proceeding does not abate, but may be continued (as an amended proceeding for letters of administration) on the substitution of the residuary legatee in the place of the executor, see *Jadego v. Jadeogo*, A.I.R. 1969 Guj. 82—following 68 M.L.J. 899 = A.I.R. 1988 Mad. 114. Cf. A.I.R. 1921 P.C. 123; I.L.R. 36 Cal. 799; A.I.R. 1934 All. 1063.

"Unadministered": Cf. sec. 258 and notes on grants *de bonis non*. "Unadministered" here means unadministered by the executor under the authority of Court. *Khulchand v. Motilbai*, 30 S.L.R. 201 = A.I.R. 1936 Sind. 150 = 165 I.C. 202, cited above. Comp. A.I.R. 1946 Lah. 277 = 226 I.O. 120.

Grant to Mohant's successor in case of bequest to religious institution:—Where a will is in favour of a religious institution and the property is to be managed by the Mohant in charge, on the death of such Mohant, his successor is entitled to claim letters of administration with respect to the will, *Lachman Das v. Ram Chander*, A.I.R. 1988 Lah. 265 = 146 I.O. 547.

233. [Pro. S. 20 & Suc. S. 197] When a residuary legatee who has a beneficial interest survives the testator, Right to administration of representative of deceased residuary but dies before the estate has been fully administered, his representative has the same right to legatee. administration with the will annexed as such residuary legatee.

Administration to Residuary Legatee's Representative:—As to the right of the residuary legatee himself to administration, provision has been made in sec. 289,

supra. This section provides that if such legatee dies after the testator but before the estate is fully administered his representative will be entitled to administration *cum testamento annexo* (with the will annexed), *Isted v. Stanley*, Dyer, 872, see *Williams On Executors*, 11th Ed. 175, 220. The word, "representative" in this section and in the next one should not at least in the case of a Hindu be restricted to a "legal representative" but include his heir, so that on the death of the residuary legatee, without fully administering the estate, his heirs will be entitled to obtain a grant of administration with a copy of the will annexed, *Manji Jetha Lakhani, In re*, 34 Bom. L.R. 606 = A.I.R. 1932 Bom. 270 - 138 I.C. 812. A sole legatee may be regarded as a residuary legatee and his heirs may avail themselves of the benefit of this section, *Harijada Saha v. Govinda Chandra*, 51 C.W.N. 917. To make this section applicable (i) the residuary legatee must survive the testator, i.e., acquire a vested interest; (ii) he must die before full administration, so that, if he renounces or the estate is fully administered, the section will not apply: *Williams On Executors*, 11th Ed. pp. 175, 200, *et seq.*, (3) he must have full interest, and not be a mere life tenant, *Weidrill v. Wright*, 2 Phill. 243.

Right of the Representative of an ordinary Legatee:—The right of the legatee to obtain a grant of letters of administration is a personal right and if he dies during the pendency of the application, this right does not devolve on his heir, *Haribhulan v. Manmatha*, 45 Cal. 882; 51 I.C. 76. According to the Bombay Court, the only heir of a residuary legatee, who died after obtaining probate but without having fully administered the estate of the testator is entitled to obtain a grant of administration with a copy of the will annexed, *Re Manji Jetha Lakhani*, 34 Bom. L.R. 608 = A.I.R. 1932 Bom 270 - 138 I.C. 712; read also the notes under the last heading. The Patna Court has permitted the heir of the legatee, upon the latter's death, to continue the proceedings at the appellate stage, *Phekri v. Manki*, 9 Pat. 698 = A.I.R. 1920 Pat. 618 - 128 I.C. 128. The reason for this view is that the scheme of the Act as indicated by this section itself, is to make a distinction between the right to obtain a probate and the right to apply for letters of administration. The right to obtain a probate is a personal right confined to the executor and is incapable of devolving upon his heir, but the position is not exactly the same in the other case, *Ibid.*

Right of representative of Universal Legatee:—Read the notes under a cognate heading at p. 444, *ante*. Consult *Re Mahabir Singh*, A.I.R. 1963 Punj. 66; also A.I.R. 1927 Lah. 414; A.I.R. 1928 Lah. 516.

Fully administered:—The section applies only if the estate is not fully administered. So where there is no estate to be administered and no suggestion that any creditors have to be paid or any debts to be realised and where the application is an obvious device to obtain a decision from the Probate Court on the

question of title, no letters should be granted. *Prosonna v. Ram Chandra*, 17 C.L.J. 66; 17 I.C. 155. Read also Sale J.'s Judgment in *Re Nursing Chhender Bysack*, 8 C.W.N. 635—approved of in *Lakhmi Narain v. Nandarani*, 9 C.L.J. 116 (118) and in *Lalit Chandra v. Baikunta Nath*, 14 C.W.N. 468 (466). Cf. also 28 C.L.J. 271; 31 Cal. 89 (98); 6 C.W.N. 345.

234. [Pro. S. 21 & Suc. S. 198] When there is no executor and

Grant of administration where no executor, nor residuary legatee nor representative of such legatee. who would be entitled to the administration of the estate of the deceased if he had died intestate,

or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

Scope of the Section:—The section deals with cases where no executor has been appointed or if an executor has been appointed he declines to act. The section has no application when the executor appointed by the will is a minor. The appropriate procedure in such a case is that prescribed by sec. 244, *post*, *Viramma v. Sevhamma*, 54 Mad. 266=60 M.L.J. 264=1981 M.W.N. 213=A.I.R. 1991 Mad. 349=132 I.C. 127.

Administration where no Executor, no Residuary Legatee, nor his representatives:—Where all these persons are wanting or decline or are incapable to act then letters of administration *cum testamento annexo* may be granted to (1) persons entitled to administration upon intestacy, i.e. the next of kin. Cf. secs. 218 and 219, see *Re Homun*, 9 P.D. 61; *Re Payne*, 115 L.T. 935, or (2) an ordinary legatee with a beneficial interest, or (3) creditor. Comp. A.I.R. 1955 T.C. 177. The above specification is in order of priority. *Vide Williams On Executors*, 11th Ed. pp. 329, 379, 381. The term "Residuary legatee" in the section does not include the universal legatees, *Kamla Prosad v. Murli Manohar*, A.I.R. 1926 Pat. 356=94 I.C. 750. In granting administration the Court follows the "beneficial interest", *Re Gill*, 1 Hagg. 341. In cases of competition between two next of kin or two legatees, the Court will prefer the man with greater business capacity. *Williams v. Wilkins*, 2 Phil. 100. For the purposes of this section persons who are the sole beneficiaries under a will at the date of the application for Letters of Administration may be regarded as residuary legatees, although not named as such. *Durgapada Bera v. Atul Chandra*, 41 C.W.N. 1204=A.I.R. 1937 Cal. 595. If a person declines to accept Letters of Administration and thereafter permission is given to another person to prove the will, the former can no more turn round and offer to accept the grant, *Ram Rani v. Indrani*, 1942 O.W.N. 452=A.I.R. 1942 Cudh. 510=205 I.C. 361.

Administrator-General's Right:—The Administrator-General of the Presidency shall be deemed by all Courts in the Presidency to have a right to letters of administration other than *letters pendent lite* in preference to that of (1) creditor; or (2) a legatee other than an universal legatee; or (3) a friend of the deceased. *Vide* sec. 8 of the Administrator-General's Act (III of 1913). In a High Court the Administrator-General has preference under sec. 7 of the above Act over every body, except the next of kin. Where the widow or the universal legatee takes no steps to take out letters, the Administrator-General has the right to step in. *Ram Kali v. Administrator-General*, I.L.R. (1948) All. 740—1949 A.L.J. 448—A.I.R. 1949 All. 356—209 I.C. 446. *Vide* also secs. 10-14 of the said Act.

No Grant to an Attorney:—The Court cannot grant administration to an Attorney who is only authorised to produce to the Court the confirmation of the trust, disposition and settlement for the purpose of having it re-sealed at Calcutta or to demand, recover or collect all sums of money etc. due to the deceased's estate. *Re William Rennie*, 40 Cal. 74 : 18 I.C. 907.

Grant to Shebait or Purohit:—Where a Hindu testator directed by his will the payment of a legacy of Rs. 50 to the priest (*purohit*) of an idol and the residue was bequeathed to the idol itself, the person to apply for letters of administration is the Shebait and not the priest: The Shebait appoints the purohit and that does not transfer the management of the estate from the Shebait to the purohit. *Kalikrishna v. Makhan*, 50 Cal. 283 : 36 C.L.J. 441 (443) : 27 C.W.N. 411 : (1923) Cal., 160 : 72 I.C. 636.

Creditor:—For the creditor's position, *vide* notes under secs. 218 and 219, *supra*. See also *Coombs v. Coombs*, (1867) L.R. 1 P. & D. 288; *Akhoy Kumari v. Prosonno*, 30 I.C. 538 (Cal.); *Re Hake*, 89 L.J. 113. Grant of administration to a creditor does not operate as an extinguishment of his debt, unless the administrator has in his hands legal assets presently available, *Husainara v. Balamannessa Begum*, 38 Cal. 842 : 18 O.L.J. 8 : 8 I.C. 887. Letters of administration may be granted to a creditor although the liabilities of the deceased appear to be in excess of the assets. Application in the Insolvency Court is not the creditor's only remedy, *Re Makhanlal Chatterjee*, 15 C.W.N. 360. For other cases relating to grant to a creditor, see *Lord Carpenter v. Shelford*, 2 Lee 608; *Kearney v. Whittaker*, 2 Lee 325. Before granting administration to a creditor citation should be issued to the next-of-kin, *Re Beeraj Fathay Chand*, 10 C.W.N. 1viii. Cf. *Re Sumboo Chunder Mitter*, 1. Taylor & Bell. 89.

Court's Discretion:—*Vide* notes at P. 421, ante. Also *Re Duncan*, 1 B.L.R. 3 (O.O.J.); *Buddhu v. Rami Sarup*, 95 P.L.R. 1917. The Court has always a discretion in the matter of granting administration, and is not necessarily bound to grant it to the person with the best right, *Re Neekterlien*, 1 B.L.R. 19 (O.O.J.)

Formal Proof of will necessary:—Will has to be formally proved irrespective of the question whether its execution is admitted by the other side or whether it

is registered or not. No Court will issue a grant on the basis of a will not formally proved, *Tuban v. Payre Lal*, 88 P.L.R. 980-164 I.C. 778. Read the notes under the heading "Proof of will" under sec. 288, post.

235. [Pro. S. 22 & Suc. S. 199] Letters of administration with the will annexed shall not be granted to any legatees other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

Citation before granting Administration to Ordinary Legatees:—The section lays down that before granting administration to an ordinary legatee (*i.e.* other than an universal or a residuary legatee) citation should be issued to the next-of-kin. Under the preceding section we have seen that the

Object of Citation. next-of-kin, has priority over the ordinary legatee, and the object of the citation is to ascertain whether the person primarily entitled to administration will accept it or not. The issue of notices to the next-of-kin to show cause why letters of administration should not be granted to an applicant is a sufficient compliance with the requirements of this section. If the next of kin denies the validity of the will, it amounts to refusal of the letters of administration. *Ramrani v. Indrani*, 1942 O.W.N. 452—A.I.R. 1942 Oudh, 510-205 I.C. 361. According to the Patna Court, this section does not relieve an universal or a residuary legatee from an obligation to issue citation on the next-of-kin for the purpose of giving him an opportunity of protecting his interest in the reversion, *Priyanath Bhattacharji v. Sailabala Devi*, A.I.R. 1929 Pat. 385-122 I.C. 537. As to what is citation, *vide* at pp. 437-38, ante. It is general when the invitation is to all the interested persons at large; it is special when addressed to some particular individuals. As to the next-of-kin *vide* sections 218, 219 and notes at p. 42, ante; also *Ram Rani v. Indrani*, 1942 O.W.N. 452—A.I.R. 1942 Oudh, 510-205 I.C. 361. A debtor of the deceased not related to him is not entitled to any citation hereunder or to file any objection to the making of any grant, *Balwantrao v. Mst. Anandi*, 1958 Nag. L.J. (notes), 104.

236. [Pro. S. 13 & Suc. S. 189] Letters of administration cannot be granted to any person who is a minor or To whom administration may not be granted. is of unsound mind,* nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the State Government in this behalf.†

* The same omission as in sec. 228, see Act XVIII of 1927.

† The words in italics have been added by Act XVI of 1931, which is in force from the 1st October, 1931.

The Section :—The principle of this section is exactly the same as that of sec. 223, *ante*; and the cases under that section may be referred to for elucidation of this section. *Vide* notes on clause 223 of the Original Bill. In England before the Married Women's Property Act, 1882, if an administratrix were a married woman, her husband had to join in the administration bond. This practice has since been abandoned in England and the present section has been amended by dropping the following words, "nor unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, to a married woman without the previous consent of her husband" in order to bring it into conformity with the English law. *Vide* notes at p. 426, *ante*, under the heading 'Married Women'. The amendment of 1931 is intended to authorise grant of letters of administration to certain companies. For the position of an association of individuals, registered and not incorporated, read *Mahasaya Krishna v. Maya Devi*, 49 P.L.R. 228 = A.I.R. 1948 Lah. 54.

Administration to a Minor &c. :—Letters of administration cannot be granted to any person who is a minor or is of unsound mind *Ma Nyi Ma v. Aung Myat*, 9 L.B.R. 186 : 12 Bur. L.T. 27 : 50 I.C. 324 ; *Ella Lavellette v. E. A. Taluni*, A.I.R. 1925 Pat. 323 : 6 P.L.T. 584 : 86 I.C. 92. A grant of administration to a minor is a nullity. An administrator of the estate of a deceased is in no sense the guardian of his minor heirs. If he sells their property as guardian, the sale is void and cannot be ratified by the minors. *Ibid.* Cf. secs. 29 and 30 of the Guardians and Wards Act. This section prohibits the grant even under the guardianship of the minor's father, *Jai Lal Singh v. Hari Singh*, 1908 A.W.N. 267. A minor legatee cannot be granted Letters of Administration, and where there are other legatees also, the mother of the minor cannot be granted the letters on behalf of the minor legatee, *Ma Saw v. Ma Thit*, 5 Bur. L.T. 235 : 6 L.B.R. 118 = 18 I.C. 187. Minority is to be determined with reference to this Act, *Sew Narain Mahata*, 21 Cal. 911. For other matters, *vide* notes under sec. 228, *ante*.

Court of Wards :—For grant of letters of administration to the Court of Wards, *vide* under that heading at p. 422, *supra*.

Corporation and Registered Society :—Grant of letters of administration to them hereunder is possible; see *Benaras Hindu University v. Gouri Dutt*, 1949 A.L.J. 523 = A.I.R. 1950 All. 196—ref. to 34 I.C. 667 ; 66 I.C. 335 ; also *Ganga Sahai v. Bharat Bhau*, 1950 A.L.J. 353 = A.I.R. 1950 All. 480.

CHAPTER II.

OF LIMITED GRANTS.

Grants limited in duration.

237. [Pro. S. 24 & Suc. S. 208] When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

Lost Will:—When the contents of the lost will are satisfactorily proved by a copy or draft thereof there is no bar to grant of administration with will annexed, *Sugden v. Lord St. Leonards*, (1878) L.R. 1 P.D. 154; *Issur Chandra v. Dayamoyee Debi*, 8 Cal., 864; *Sukumari Gupta v. Bharat Mandal*, 20 C.L.J. 148: 26 I.C. 980. If a will be traceable to the possession of the testator, and be not forthcoming after his death, there would be a presumption of destruction of the will, *Satya Charan Pal v. Asutosh Pal*. A.I.R. 1953 Cal. 667. When the existence of a will is proved but the same is not forthcoming the presumption, though of revocation, can be rebutted by convincing evidence, *Anwar Hossein v. Secretary of State*, 91 Cal. 885: 8 C.W.N. 821. When the testator did not appoint an executor and the residuary legatee applied for letters of administration with the will annexed 12 years after the death of the testator and the objector did not plead revocation but set up non-execution of the will; held, that the execution of the will in the manner required by law having been proved it lay upon the objector to plead and prove revocation and no such plea having been taken it could not be held that the will was revoked, *Sarat Chandra Basak v. Golap Sundari Dasya*, 18 C.W.N. 527. For the probate of the draft of a will, see *Esfari Dasya v. Todei Dasya*. 55 Cal. 482: A.I.R. 1928 Cal. 807-110 I.O. 289, which says that a probate of the draft is possible only when the will itself has been lost or mislaid. A Court can order probate of the draft of a will in case where the will itself is not proved, only if it is proved that the draft was prepared under instruction from the testator, *Datar v. Mahajan*, A.I.R. 1928 Nag. 114-106 I.C. 691.

Application of the Section:—The section applies, (1) if the will is lost; or (2) if it is mislaid since the testator's death. [The words "since the testator's death" qualify only the word "mislaid" and not the word "lost." *Sarat Chandra v. Golap Sundari*, *supra*—approved in 2 D. R. 99—cited at p. 443, *ante*]; or (3) if it has been destroyed by wrong or accident and not by an act of the testator (destruction by the testator being tantamount to revocation, see 70, *supra* and notes at p. 184, *ante*); and (4) if a copy or draft of the will has been preserved, Cf.

Pickington v. Gray, (1899) A.C. 401; *Re Grandon*, (1901) 54 L.T. 380. For the requirements of this section, read generally, *Satya Charan v. Asutosh*, A.I.R. 1958 Cal. 667. Although the section speaks of only probate, it applies to administration *cum testamento annexo* as well, *vide*, see. 240, *post*. The grant under this section is limited in duration and lasts till the appearance of the original will or its authenticated copy. For the procedure to be adopted or for the pre-requisites of this section, *vide Iswar Chandra's case, supra*. Citation is necessary on persons interested in case of intestacy, *Re Apiled*, 1899 P. 272 : 68 L.J.P., 128; *Re Brassington*, 1902 P. 1.

Limited Grant :—The grant under this section is *limited in duration*, that is, limited until the original or a properly authenticated copy of it is produced. Cf. *Anwar Hossein v. Secretary of State*, 81 Cal., 885 : 8 C.W.N. 821, and the cases cited therein. The limited grant is always revocable, Cf. *Re Nalo Doorga*, 7 C.L.R. 3t7. As to whether a grant can be made in respect of a part of an estate, read (1955) 1 M.L.J. 542 — A.I.R. 1955 Mad. 411.

Authenticated copy :—*Vide* notes at p. 435, and under the heading "Exemplification" at p. 436, *ante*.

238. [Pro. S. 25 & Suc. S. 209] When a will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

Scope of the Section :—This section, just like the preceding one, lays down the rule of proof for cases where the original will is lost, *Sukumari Gupta v. Bharat Mandal*, 20 C.L.J. 148 : 26 I.C. 980. But it differs from the other one in the fact that it does not contemplate the preservation of a copy or draft of the lost will; therefore, under this section, probate can be granted only of the contents and not of the copy or draft of the will as under sec. 237. The section also does not mention the case of the will being *mislaid*. Destruction under the section should also not be by the testator with a view to revocation. A probate granted hereunder is general in its powers, and necessarily must be limited in duration, though the section itself does not explicitly say so, as is done in most of the sections of this Chapter. Attention is drawn to the headings "of limited Grants" and "Grants limited in duration." For the procedure to be adopted in making a grant of the

Probate of portion, *Contents, vide Issur Chandra v. Doyamoyi Debia*, 8 Cal. 664, cited under the sec. 237. Probate may be granted of a portion of a will after striking out or omitting such portion of it as are proved to have been inserted in it without the testator's knowledge, *Girish Chandra v. Rashmi*, 1 C.L.J. 109—referring to and following *Rhodes v. Rhodes*, (1852) 7 App. Cas. 192; *Allen v. McPherson*, (1847) 1 H.L.C. 191; *Morrell v. Morrell*, (1882) 7 P.D. 68.

To make the grant of probate in respect of a lost will possible it is necessary that its contents have been established by evidence, *Kedar Nath v. Rajkumar Das*, 69 C.L.J. 394—A.I.R. 1939 Cal. 674—186 I.C. 17. Where only a portion of a will is found it is no bar to grant of probate of the will to that extent only. The existence of the mere portion is not to be construed as showing that the will in question was destroyed by the testator unless there is evidence conclusive to that effect, *Kedar Nath v. Sorajini*, 3 C.W.N. 617. The practice of the English Courts has been followed in the above decision and the principles laid down in *Sugden v. St Leonards*, I.R. 1 P.D. 154 and *Woodward v. Goulstone*, L.R. 11 App. Cas. 469 have been acted upon. The same procedure may be adopted in the matter of proving the contents of a lost codicil as in that of a will. The general trend of all decisions is that every case is to be decided in the light of the evidence adduced; thus, when a probate is asked for of a will, which it appears was destroyed in the lifetime of the testator it is to be proved that the destruction was through mistake or without the knowledge of the testator and again when revocation is to be proved the facts must show that at the time of the alleged destruction the possession of the documents was with the testator. The section is an enabling one and there is nothing in it to prevent the Court from following the rulings of the English Courts on the subject, *Kedarnath v. Scryent*, *supra*.

Presumption of Revocation from loss of Will:—If a will is shown to have been in the custody of the testator and is found missing at the time of his death, a presumption will arise (though not always) that he himself destroyed it with a view to revocation, *vide Surat Chandra v. Golap Sundar*, 18 C.W.N. 627; *Sugden v. Lord St. Leonards*, *supra*; *Anwar Hossein v. Secretary of State*, 31 Cal. 685; *Shab Sabti v. Collector of Meerut*, 29 All., 62, and the cases cited at p. 186, under the heading "Loss of will," and at p. 184. This presumption is very weak in India and is rebuttable by showing that the act of destruction is not attributable to the testator but to some easuality, *Allan v. Morrison* (1900) A.C. 604, and probate of such lost will can be granted under this section or the last one according to circumstances. Cf *Kedarnath's case*, *supra*. [N.B.—As to when the presumption will not arise, see *Chidambaran v. Swaminatha*, 18 M.L.J. 185].

Established by Evidence:—Before a grant can be made under this section, the contents must be established by evidence. *Sugden v. Lord St. Leonards*, *supra*. Such evidence must necessarily be secondary Evidence within the meaning of sec. 65 of the Indian Evidence Act (*vide* Cl. (c) of that section). Cf *Woodward v. Goulstone*, 11 A.C. 469; *Thornton v. Thornton*, (1899) 3 C.W.N. clixix; *Eyre v. Eyre*, 1908 P. 131; *Clark v. Turner*, 2 C.W.N. xcix; *vide* also the cases cited at pp. 224-26 of Madhuri Ghose's Evidence Act; even parol evidence may be used for the purpose. Cf *Re Barley*, L.R. 1 P. & D. 269; *Wharam v. Wharam*, 8 Sw. & Tr. 301; *Poimora v. Wharton*, 9 Sw. Tr. 448; *Bur's v. Bur's*, L.R. 1 P. & D. 472; *Woodward's case*, *supra*.

239. [Pro. 26 & Suc. S. 210] When the will is in the possession of a person residing out of the State in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced.

Probate where Original exists but not available:—Where an original will exists, but not within the easy control of the intending grantee and a speedy grant is desirable, probate can be granted of a copy of such will for a limited duration, that is, until the will or an authenticated copy of it is produced. The law is always anxious to see that a deceased testator's estate is represented as early as possible. An application under this section is to be supported by an affidavit stating that (1) the original will is in the control of a person residing outside the State, (2) such person has refused or neglected to deliver it up, (3) the circumstances or the manner in which a copy of it has been transmitted, (4) the circumstances showing the inconvenience that would result in case the grant be delayed, and that (5) no better or other authentic copy of the will exists in the State. *Prima facie* proof of the execution of the will is sufficient to warrant a grant of probate in uncontested cases. *Re Noho Doringa*, 7 O.L.R. 367. For the Court's power to order production of such a will, *vide* sec. 267, *n.r.a.* For forms of affidavit and procedure, see Coots's, 16th Ed. p. 189. For grant of a nuncupative will, see 24 Bom., 8.

Refuse:—To attract the operation of the section it is quite enough if the person holding possession of the original will refuses or neglects to deliver it up. It does not matter where the refusal is under colour of right and justified. The lien of a solicitor does not extend to an original will and he cannot refuse to produce it. *Georges v. Georges*, 18 Ves., 294.

State:—For definition, *vide* sec 2(g) and the notes at p 11, *ante*. The existence of the will outside the State, if not forthcoming, is sufficient for the application of this section.

240. [Pro. S. 27 & Suc. S. 211] Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it is produced.

Administration until Will produced:—This section provides for meeting the temporary emergency of the nature indicated in it. A clear illustration of the same

is noticed in *Re Metcalfe*, 1 Add., 348, where the Court was persuaded to grant administration pending the despatch of the last testament of the deceased, referred to by himself before his death, from India to England. Cf. *Re Roberts*, L.R. 8 P. & D. 110; Coote's, 15th Ed. 187, *et seq.* The requisites of the section are; (1) a reason to believe that a will of the deceased is in existence, (2) but it is not forthcoming, (3) there is no copy or draft of it and no evidence of its contents. "Where a will, proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, the Court will grant administration limited until the original is found, *Re Campbell*, 2 Hagg. 555. Cf. *Re Wright*, 1898, P. 21. As no copy or draft of the will is available, and as its contents are unknown, this section contemplates only an administration and no probate.

Grants for the use and benefit of others having right.

241. [Pro. S. 28 & Suc. S. 212] When any executor is absent from the State in which application is made, Administration, with will annexed, to attorney of absent executor. and there is no executor within the State willing to act, letters of administration with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

"Sec 212 of the Act of 1865 uses the word 'attorney.' Sec 28 of the Act of 1881 uses the word 'agent.' Both these words are used in the Consolidated Bill"—*Notes on Clauses of the Original Bill.*

Scope of the section:—Read *Re Laurence Claude*, (1954) 2 M.L.J. 249—A.I.R. 1954 Mad. 898 [This section may be read along with sec. 228, ante].

Administration to Attorney or Agent of absent Executor:—This section provides for the temporary grant of administration to the attorney or agent of an absent executor for the use and benefit of the principal till a *procura* grant is made, *Goods of Black*, 18 P. & D. 5; *Re Burch*, 2 Sw. & Tr. 189; *Sidney Thomas, In re*, I.L.R. (1945) 3 Cal. 512—A.I.R. 1949 Cal 560; *Advait Nath Sil, In re*, I.L.R. (1948) All. 611—1948 A.L.J. 896—3 D.L.R. (All.) 24—A.I.R. 1948 All 361 (F.B.) read the notes at p. 494, *ante*. The word "attorney" comes from the repealed Succession Act of 1865 and the word "agent" from the repealed Probate and Administration Act. Absence of the executor from the State [for definition, *vide* sec 2 (g)] and want of an executor, willing to act, in the State, are the essential prerequisites of this section. The attorney or the agent is not entitled to probate (which can be granted to the executor alone, sec. 222), but to letters of administration cum *testamento annexo*. Comp. *Re Reginald Phelap*, 1954 Ker. L.T. 988—A.I.R.

1955 Trav.-Co. 102. No grant under this section can be made to an agent engaged as solicitor to do solicitor's business. *Re William Rennie*, 40 Cal., 74 : 18 I.C. 907. It is necessary that the attorney or the agent should be within the jurisdiction of the Court, *Goods of Bryant*, 4 B.L.R., Ap. 49. [Compare the English cases of *Leson*, 1 Sw. & Tr. 463 ; *Re Dunch*, 2 Sw. & Tr. 139 ; *Re Roberts* 1 Sw. & Tr. 64]. When a person dies leaving properties both in India and England with a will appointing therein executor both in England and India probate was granted to his executor in England while his executor in India renounced, the attorney for the executor in England, however, applied, for probate in India and the same was granted, *In the Goods of Leckie*, 15 B.L.R. 8. On the application for letters of administration to the estate of a deceased, who was domiciled in Scotland and to whose estate one P had been appointed executor, the application being made by one K under a power of attorney granted by P such power not having been executed and authenticated in the manner provided by Sec. 86 of the Evidence Act. Held, that the application must be refused, *In the Goods of Primrose*, 16 Cal. 776. The Chief Magistrate of the city of Glasgow being a person lawfully authorised to administer oaths a declaration as to the execution of a power of attorney taken before him and authenticated by his certificate and the common seal of the city of Glasgow and by a notarial certificate is sufficient proof of the execution of the power, *In the Goods of Henderson*, 22 Cal., 491, (16 Cal., 776 dissented from). This section will not apply if the will has been proved abroad (i.e beyond the State) by the absent executor and then his attorney is not entitled to any administration under this section, *Re Ashton*, (1905) A.W.N. 251. The law has been stated too broadly in this section, because neither the scheme of the Act nor the principle of this section is to compel a foreign executor living abroad to come to this country to take out letters here personally; such an executor can vicariously obtain an Indian probate through an attorney empowered in that behalf by means of a power of attorney, *Ex Cankte*, *Re*, 1 L.R. (1940) Mad. 820 = (1940) 1 M.L.J. 264 = 61 L.W. 219 = (1940) M.W.N. 150 = A.I.R. 1940 Mad. 680 = 192 I.C. 381.

Power of Attorney :—For definition see sec. 2 (21) of the Ind. Stamp Act. A general power of attorney authorising appearance of the agent in Court on behalf of the principal is sufficient for the purposes of this section. Walker & Elg. 86; But see *Re William Rennie*, *supra*. A power of attorney is very strictly construed as regards the powers conferred, *Bryant v. La Banque*, (1693) A.C. 170; *Bank of Bengal v. Fagan*, 5 M.I.A. 27. The power of attorney should be filed along with the application for grant, *vide Belchambers Rules*, 749, p. 811 (New Ed.). The execution of the will must be proved. No proof is necessary of the execution of the power, as the authentication of the Notary or the Registrar (as the case may be) will do, *Re Myne*, 33 Cal. 625. Cf. Sec. 86 of the Ind. Evidence Act. and notes under sec. 242, *infra*.

"Use and Benefit" — These words do not exclude those who are beneficially interested, *Chambers v. Birchell*, 2 Hare, 586.

Grant under the Section is limited.—The grant to an attorney under this section is a limited one and lasts till a *pucca* grant is made, *vide* at p. 454, *sugna*. It also comes to an end on the death of the executor, *Webb v. Kirby*, 7 De G M & G 376.

242. [Pro. S. 29 & Suc. S. 213] When any person to whom, Administration, with if present, letters of administration, with the will will annexed to attorney of absent person who, if present, would be entitled to administer, might be granted, is absent from the State, letters of administration, with the will annexed, may be granted to his attorney or agent limited as mentioned in section 241.

*N.B. — Vide "Notes on Clauses" under sec. 241, *sugna*.*

Scope of the Section.—The principle of this section is very much like that of the preceding one; therefore, the notes under that section may be referred to for elucidation of it. The only point of difference between these two sections is that this section contemplates the absence of a *possible* administrator, whereas the last one that of the executor. For grant of administration to an attorney charged with solicitor's business, see *Re William Rennie*, 40 (a), 74, 1810 907.

Administration to Attorney or Agent of an absent person entitled to administration — *Vide* the notes under sec. 241, *sugna*. On an application for grant of letters of administration with copy of the will annexed to the constituted attorney of the sole executor of the deceased, held, that Section 85 of the Evidence Act is mandatory. In the case of a document purporting to be a power of attorney and to have been executed before and authenticated by a notary public, the authentication of the notary is to be treated as equivalent of an affidavit of identity of the executant, and no affidavit of identity is necessary. In any particular case, if the Court is not satisfied, it may under Rule 748 of the Rules and Order of the High Court of Calcutta, require further evidence of the verification of the power of attorney. *In re Mylne*, 88 Cal., 625.

243. [Pro. S. 30 & Suc. S. 214] When a person entitled to administration in case of intestacy is absent from the State and no person equally entitled is willing to act, letters of administration may be granted to the attorney or agent of the absent person, limited as mentioned in section 241.

N.B. — Vide "Notes on Clauses," under sec. 241, ante.

Scope of the Section :—This section differs from sec. 242 in the fact that it contemplates *intestacy*, whereas that section contemplates *testacy*. Therefore, grant under this section cannot be *cum testamento annexo*. The underlying principle of both the sections is the same. As to the persons who are entitled to administration in case of *intestacy*, and as to the question of priority among them, *vide* secs. 218 and 219, *ante*. The section provides for administration to the attorney or agent of an absent person who is entitled to administration on *intestacy*. The law on this point in India seems to be different from that in England. In India administration is to be granted to an agent or attorney only when no other person having the same status as the person giving the power of attorney is available, whereas, under the English law it is not so. Therefore, the question of notice upon the other persons of the same status does not arise here, Cf. Coote, 129; Tr. and Coote, 183. In granting letters to administer the estate of a deceased person, a limited grant of letters should not be awarded to the attorney of an absent sharer, if a sharer, who is entitled to as much as the absent sharer is within the State and is willing to administer the estate, *Estate of Molla v. Esoof Ali*, 8 Bur. L.T. 108: 26 I.C. 749.

Liability of Attorney :—An attorney who takes out administration in the name of another is compellable to exhibit inventory and account, *Bailey v. Bristow*, 2 Rob., 146.

244. [Pro. S. 31 & Suc. S. 215] When a minor is sole executor or sole residuary legatee, letters of administration during minority of sole executor or residuary legatee, with the will annexed, may be granted to the legal guardian of such minor or to such other person as the Court may think fit until the minor has attained his majority at which period, and not before, probate of the will shall be granted to him.

N. B.—"In view of the wider scope of the Bill, the language of sec. 31 of the Act of 1881, has been followed, i.e. the words "had attained his majority" have been substituted for the words "shall have completed the age of 18 years"—*Notes on Clauses of the Original Bill*. Therefore, with respect to the persons subject to the Indian Succession Act of 1865, there has been a slight modification of the law.

Administration to Legal Guardian of Minor Executor or Residuary Legatee :—Where the sole executor or the sole residuary Legatee is a minor, administration *cum testamento annexo* may be granted to the legal guardian of the minor or to some other suitable person at the discretion of the Judge, *Goods of Morris*, 2 Sw. & Tr. 360. See also *Bhagawati v. Bahuria R. Koer*, (1920) Pat. 187: 1 Pat. L. T. 804; 6 Pat. L. J. 347: 57 I.C. 682. The grant will be limited in duration lasting

till the attainment of majority by the minor, when probate will be granted to him. This section will not apply unless the minor is the executor or the residuary legatee; and therefore in that case administration will not be granted to his legal guardian. *Ma Kejun v. Ma Shwe*, 10 Bur. L.T. 107 : 86 I.C. 266.

The rule is enacted to facilitate the representation of the estate in the hands of a minor executor or legatee. Upon appointment as an administrator under this section, the guardian's liability is not *qua* guardian, but as an administrator under this Act, see *Fatherley v. Pate*, 8 Atk. 603 ; *Re Girish Chandra* 6 C.W.N. 581. Cf. *Cope v. Cope*, 16 O.D. 49 ; *Monsell v. Armstrong*, L.R. 14 Eq. 425, *Baroda Prasad v. Gagendra*, *infra* ; *Re Thompson*, (1896) 1 Ir. R., 356 ; *Bonney v. Edwards*, 12 O.C. 390 ; *Madhavrao v. Maneklal*, 2 Bom. L.R. 797.

The Courts in England seem to exercise their discretion widely in granting administration in matters contemplated by this section. Cf. *West v. Welly*, 3 Philim., 379 ; *Havard v. Havers*, Barnet Ch. Ca. 28, *John v. Bredbury*, L.R. 1 P. & D. 215. When the minor is about to attain his majority, the Court should hold its hands, and make no appointment hereunder, *Muhamdu v. Naznam*, 6 Cal., 19. The purchase at an execution sale of a legatee's interest by the administratrix *durante minoritate* was held to be valid. Further it was laid down that upon the death or termination of authority by operation of law of an administration *durante minoritate* it is the duty of the executor or other person who succeeds him in the administration to call upon his predecessor or personal representative to render account of the estate and recover damages for waste and misappropriation and failure to do so will make him liable *Baroda v. Gagendra*, 18 C.W.N. 557 : 9 C.L.J. 383. Where a husband applied for letters of administration for the use and benefit of his minor wife, it was held that such application was not maintainable until the applicant had been appointed guardian of his minor wife; *In the Goods of Nirongini Debi*, 34 Cal. 706. Where the minor's legal guardian or such other person as may seem to the Court fit to have Letters of Administration on behalf of the minor makes an application for a grant, he should arm himself with a guardianship certificate to be fully qualified for the purpose *Virumma v. Sesamma*, 54 Mad. 266 = 60 M.L.J. 264 = 33 L.W. 159 = 1931 M.W.N. 219 = A.I.R. 1921 Mad. 943 = 192 I.C. 127 — relying on 34 Cal. 706, *supra*. For administration bonds, and liability of sureties, read (1954) 2 All. E.L. 736.

Administration and not probate:—Under this section the legal guardian of a minor executor is entitled only to Letters of Administration and not to a probate. He cannot insist on getting a probate on the ground that the minor on whose behalf he is seeking the grant is an executor. If an application for probate is made in the name of the minor executor, which is unsustainable, the application has to be changed into one for administration under this section by an amendment, which can be done even at the appellate stage, *Bhag Mal v. Malik Singh*, A.I.R. 1931 Lah. 229 = 191 I.C. 389.

Minor :—*Vide sec. 2 (e), supra*; also the notes and the case of *Sew Narain Mahata*, at p. 11, ante.

Legal Guardian :—For definition of "guardian" see sec. 4 (2) of the Guardians and Wards Act, (VIII of 1890) at p. 13 of author's *Guardians & Wards Act*. Legal guardian will be a guardian who is entitled to act as such under some provision of law, e.g. one appointed under sec. 7 of the said Act. So, a testamentary Guardian will be a legal guardian if declared a guardian under sec. 7 (3) of that Act. In section 861 of the Indian Penal Code, the words "Lawful guardian" have been interpreted to mean only the guardian of person. Though strictly speaking "legal guardian" includes guardians of both person and property, still having regard to the provisions of sec. 246, *infra*, which contemplate the person having the care and custody of the property, one would think that the words "legal guardian" are used here in the restricted sense of "lawful guardian" of the Indian Penal Code. The Manager of a minor's estate is not necessarily the minor's guardian, *Mir Sarwaijan v. Fakhruddin*, 39 Cal., 282: 16 C.W.N. 74: 16 C.L.J. 69: 14 Bom. L.R. 5: 21 M.L.J. 1196: 9 A.L.J. 98: 18 I.C. 331, P.C. As to the position of the Court of Wards, *vide infra*.

Other Person :—This shows that the Court has a very wide discretion in the matter of appointing an administrator for the minor executor's estate. For circumstances which will justify the Court in appointing a person other than the legal guardian, *vide Havers v. Havers, supra*; *Re Ewing*, 1 Hagg., 361; *West v. Welby, supra*. It seems that having regard to the rule enunciated in 34 Cal. 706, relied on in 54 Mad. 266, *supra*, such other person should eventually be a certificated guardian.

Powers of administrator during minority :—*Vide sec. 314, infra*.

Court of Wards :—The Court of Wards cannot be considered a person to be entitled to the grant of Letters of Administration, *Ganjessur Koer v. Collector of Patna*, 25 Cal., 795. But where the testator wished the minor's estate to be managed by the Court of Wards, a nominee of the Court of Wards may be appointed a guardian, *Nritya Gopal v. Administrator-General*, 10 C.W.N. 241; *Bhagwati Koer v. Bahuria Ram*, (1920) Pat. 187: 1 Pat. L.T. 804: 5 Pat. L.J. 347: 57 I.C. 589.

245. [Pro. S. 32 & Suc. S. 216]. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained his majority.

N. B.—"The wording of sec. 32 of Act V 1881 has been followed as this covers both cases"—Joint Committee Report.

Administration where several minor executors or residuary legatees:—This section differs from the last one in this that while that section contemplates a sole minor executor or residuary legatee, this section contemplates a number of them. It is only when there is not a single major executor that the provisions of this section are to apply. If, however, there is even one major among the executors no question of granting administration during minority arises. A grant under this section ceases on attainment of majority by any one of the executors, *Re Sewnarain Mahata*, 21 Cal., 911, *Taylor v. Faun*, K.B. 425, 31 T.L.R. 289, but not if any of them dies, *Jones v. Stratford*, 3 P. Wms 69. The section does not explicitly say but it is implied that after the termination of the guardian's administration, a grant will be made in favour of the minor who first attains majority.

246. Pro. S. 33 & Suc. S. 217] If a sole executor or a sole

Administration for use
and benefit of lunatic or
minor.

universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estates applicable in the case of the deceased,

is a minor or lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be.

*N B.—"Section 217 of the Act of 1865 does not deal with the case of Minors. Sec. 33 of the Act of 1881 does. As it appears to be merely *casus omissus* and the provision is in accordance with actual practice the language of sec 33 of the Act of 1881 has been adopted"—Notes on Clauses of the Original Bill.*

Administration for use and benefit of Lunatic and minor:—If a sole executor or a sole universal or residuary legatee, or a person solely entitled to administration upon intestacy, be a minor or a lunatic, administration with or without the will annexed (as the case may be) will be granted to the guardian of property of the minor or the Committee of the Lunatic or to some suitable person for the use and benefit of the minor or the lunatic until the disability is removed. This is what is known as administration *durante minore estate*. The underlying principle of this section is the same as that of sections 244 and 245, and therefore the cases under these sections should be referred to as a guide. *Vide* 34 Cal. 706 cited at p. 468, ante. Under this section a grant can be made only when it is shown that the minor or

minors for whose benefit the grant is sought is or are solely entitled to the estate of the intestate, *Re Yeshvantbhai Eknath*, 81 Bom. L.R. 999 = A.I.R. 1929 Bom. 897 = 122 I.C. 185. In the absence of a guardian already appointed by a competent authority, the Probate Court can proceed to appoint such a guardian with the object of eventually granting letters to him. In such a contingency the correct procedure under this section would be to make two prayers—one for the appointment of a guardian for the disqualified person and the other for the grant of letters, but non-adoption of this procedure is not necessary fatal, *Ma Chit Su v. Kyaw Maung*, A.I.R. 1933 Rang. 128 = 144 I.C. 821.

The Court under this section has apparently got wide discretionary powers in the matter of the grant of administration. In England the established practice seems to be to grant administration to the committee of the lunatic, *In the Goods of Phillips*, 2 Add., 336; *In the Goods of Marshall*, 1 Curt., 297, it was held that when one of two executors became a lunatic the probate was revoked and a fresh one granted to the same executor alone, power being reserved for making a like grant to the other when he should become of sound mind. Granting letters of administration under this section does not amount to an appointment by the Court of a guardian of the property of the minor concerned and has not the effect of extending the minority to 21 years, *Lakshma Ammal v. Tyagaraja*, 24 M.L.J. 460.

Lunatic:—For definition, *vide* sec. (3) of the Indian Lunacy Act, (IV of 1912). Also *Evants v. Tyler*, 2 Rob. 191, 192. The grant under this section is not to be made to the lunatic represented by the guardian, but to the guardian only for the benefit and use of the lunatic, *Jasjal Singh v. Hars Singh*, 6 A.L.J. 736 : 1908 A.W.N., 257. The words "for the use and benefit of the lunatic" create a special liability as between the administrator and the lunatic, but do not affect the position of any purchaser or creditor dealing with the administrator, *Bonny v. Edwards*, 12 O.C. 890 ; 4 I.C. 781. For the English practice relating to this subject, *vide Alford v. Alford*, 1 Deane's Rep. 322 : 8 Jur. N.S. 990 ; *Re Crump*, 3 Phill., 497 ; *Re Minness*, 3 Add., 55. Cf. Halsbury's *Laws of England*, Vol. xiv, pp. 199-200. A natural mother of a lunatic given away in adoption may be appointed to administer the lunatic's estate in the absence of any one else better qualified to do this, *Ma Chit v. Kyaw Maung*, A.I.R. 1933 Rang. 128 = 144 I.C. 821. As to the grant of letters of administration to the curator of a lunatic obtaining joint family property by survivorship in the Presidency of Bombay, see *Vithaldas Gorindram v. Vadilal*, 88 Bom. L.R. 267 = A.I.R. 1936 Bom. 191 = 163 I.C. 129.

Court's Discretion:—*Vide* notes at p. 447, *ante*; also *Re Southmead*, 8 Curt., 28.

Administrator's Liability:—For the liability of an administrator under this section, *vide Bonny v. Edwards, supra*; also at pp. 869-70, *ante*.

247. [Pro. S. 34 & Suc. S. 218] Pending any suit touching the validity of the will of a deceased person or for *Administration pen dente lite*, obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

Analysis of the Section:—The following are the essential elements of the section : (1) There must be a *litis* pending. (2) The *litis* must (a) relate to the question of the validity of the will, or (b) be for obtaining or revoking probate or administration : (3) the administrator *pendente lite* will have all the rights and powers of a *general administrator* with this exception that he cannot distribute the estate, (4) he will be under the control and direction of the Court appointing him.

Administrator Pendente Lite:—This section provides that in case of extreme necessity and when the Court is so convinced, an administration *pendente lite* is to be granted.

An infant ought to be represented by a guardian *ad litem* other than his mother who joins in the application for probate and citation ought to be issued upon such guardian and when no such citation is issued in the probate proceedings, the infant is, on attaining majority, entitled to ask for revocation of the probate.

Further, the Court of Probate would grant administration *pendente lite* in all cases where necessity for the grant is made out, and this is so, because while the suit is pending there is no one legally entitled to receive or hold the assets or to give discharges, *Brindaban Guha v. Surewar Paramanik*, 10 C.L.J. 263. In 1 C.W.N. 936, *Merza K. Bahadur v. Broughton*, it was held that the plaintiffs were entitled to maintain a suit, for administration by the Court against the administrator *pendente lite*, even though the probate proceedings have not been determined. The functions of an administrator *pendente lite* terminate on the pronouncement of the final decree. The principles of English law relating to an executor *de son tort* are equally applicable to Hindus ; *Radhika Ch. Roy v. K. S. Banerjee*, 10 C.W.N. 566. Under the Hindu law as in English law any one taking charge of property belonging to a deceased person renders himself liable for his debts. So an administrator *pendente lite* who intermeddles with the estate of a deceased person after he ceases to be an administrator, can be sued as *quasi executor de son tort*; *Kshitish Acharye Chowdhury v. Radhika Roy*, 35 Cal. 276; 12 C.W.N. 217. The position of an administrator *pendente lite* in Probate proceedings is closely analogous to that of a Receiver in a partition suit and this section gives ample power to the Court to direct the administrator *pendente lite* to do such acts as may

be necessary in the interests of the several parties to the proceedings. *Gour Mohi Dassi v. Barada K Jana*, 44 I.C. 657 (Cal.); *Pandurang Shamrao v. Dwarkadas*, 85 Bom. L.R. 700—A.I.R. 1933 Bom. 342—146 I.C. 621. An administrator *pendente lite* will be appointed only when the Court is satisfied that such appointment is necessary to preserve and protect the estate, while the litigation is pending, and that unless such necessity is made out, the estate should not be subjected to the cost and incumbrance of such an administrator. *Bhuban Mohini Debi v. Kiran Bala Debi*, 19 C.L.J. 47. See also *Magalur v. Narayana*, 3 Mad. 359 (268); *Pandurang Shamrao v. Dwarkadas*, *supra*; *Thayammal v. Sivasamam*, A.I.R. 1953 Trav. Co. 228. Before an administrator *pendente lite* is appointed the Court must be satisfied that the appointment is necessary and proper. The appointment cannot be claimed as a matter of course because the proceedings are contested. *Jogendra Lal Chowdhury v. Atindra Chowdhury*, 18 C.L.J. 94,—distinguishing *Rendall v. Rendall*, (1841) 1 Hare, 152; *Bellow v. Bellow*, (1869) 4 Sw & Tr 68: 84 L.J.P. & M. 125; *Sudhirendra Nath Mitra v. Arunendra Nath*, 84 C.L.J. 126. Cf. *Montimer v. Paull*, (1870) L.R. 2 P. & D. 85. In *Fellow v. Bellow*, *supra*, it was laid down that in cases where the Chancery Courts used to appoint Receivers, an administrator *pendente lite* would henceforth be appointed; such an administrator would be appointed for the preservation of the property pending the suit. *Madhavrao v. Minklal*, 2 Bom. L.R. 797; *Tichborne v. Tichborne*, L.R. 1 P. & D. 760; *Horell v. Wills*, L.R. 1 P.D. 103. He is subject to the control of the Court, and subject to such control, he can exercise all the powers of a general administrator, except that he cannot distribute the estate. Even the Court has no power to authorise him to do distribution works, *Kali Kumar v. Rashbehari*, I.L.R. (1947) 2 Cal 196. An administrator is not to be the nominee of any particular party but the Court will usually select a disinterested person unless he be the joint nominee of all the parties and as such the administrator is always to be regarded as the appointee of the Court. *Parish School Master v. Frazer*, 2 Hagg 613; 1 Hagg. 54. As to when a party may be appointed an administrator *pendente lite*. *Sudhirendra Nath Mitra v. Arunendra Nath*, 84 C.L.J. 126. Where an injunction is necessary the aggrieved party should ask the Court to appoint an administrator *pendente lite* in order to take charge of the entire estate, *Nivedalarani v. Chamatkarini*, 19 C.W.N. 206: 27 I.C. 617. An *interim* order of injunction can be granted pending appointment of an administrator *pendente lite*, *Atulalata v. Nuzama*, A.I.R. 1951 Cal. 561. An appellate Court's power to appoint an administrator *pendente lite* will not be paralysed by the successful endeavour of a party to obtain possession of the estate, *Pramila Bala v. Jyotindranath*, 28 C.W.N. 576: A.I.R. 1924 Cal. 631: 83 I.C. 577. For the appointment of the Administrator-General contemplated by the Administrator-General Act, (III of 1918) as an administrator *pendente lite* hereunder, see A.I.R. 1955 Pat. 56.

Administration pendente lite—how long lasts:—The administrator *pendente lite* comes in with the order of appointment and holds office so long as the *lis*

continues, that is his office terminates with the final decree, *Wieland v. Bird*, 1894 P. 262, which will be the decree of the appellate Court, if the matter is carried up to appeal, *Taylor v. Taylor*, 6 P. D. 29. Cf. *Radhica Mohun's case, supra*. *Pramila Bala v. Jyotindranath*, 28 C.W.N. 676; A.I.R. 1924 Cal. 681: 88 I.C. 597 and the cases cited therein. The order of refusal of a grant terminates the proceeding, and the administrator becomes *functus officio* thereafter, *Re Gopal Lal Seal*, 7 C.W.N. 664. An applicant for probate, who happens to be an administrator *pendente lite*, is bound to restore possession of the property to the objectors who are the heirs of the deceased. He cannot refuse restoration of the property on the plea that he had anterior possession on the basis of an independent title, because by submitting to accept an appointment from the Court he is precluded from pleading anterior possession, *Bhikari Mahton v. Mudho Kuer*, A.I.R. 1949 Pat. 177. Cf. *Wieland v. Bird*, (1894) P. 262.

This Patna Court has held that if such an administrator *pendente lite* refuses to comply with the Court's order directing him to deliver possession, he would be liable to be sued as a *quasi executor de son tort*, *Ibid*. It seems that such recusancy on the part of an appointee or an officer of the Court can be dealt with even in a contempt proceeding.

Status and power of Administrator pendente lite;—He is an officer of the Court and is therefore under its control and direction, *Charlton v. Hindmarch*, 1 Sw. & Tr. 519; *Re Graves*, 1 Hagg. 319. He holds a position very similar to that of the receiver, [*Gour Moni Das's case, supra*] Cf *Manicklal v. Surat Coomari*, 22 Cal., 648], with this distinction that he represents the estate for all purposes except distribution, *Pandurang Shamrao v. Dwarkadas*, 85 Bom. L.R. 700—A.I.R. 1938 Bom 842=146 I.C. 621. He is an appointee of the Court and is not a nominee of any of the parties, *Stanley v. Barnes*, 1 Hagg. 221. As regards his powers, *vide*, *Lasmandas v. Bejoy Kumar*, 11 O.W.N. cxvii: *Whittle v. Keats*, 85 L.J.P & M., 54; *Kashinath v. Sheo Shankar*, (1905) A.W.N. 127.

Remuneration:—To be fixed by the Court by the order of appointment.

Accountability of Administrator pendente lite:—His duty to render accounts is discharged when such accounts are complete, and honest. Cf. *Sarat Sundari v. Umaprasad*, 31 Cal 528. His accounts once passed by the Court in the presence of the parties cannot be re-opened unless fraud and mistake on the part of the administrator are proved, *Kshitish Chandra v. Osmond Beeby*, 89 Cal 687; 16 C.W.N. 616—reversing 15 C.W.N. 832.

A party appointed pendente lite Administrator:—When the other parties consent, a party to the suit can be appointed such administrator, *De Chatelin v. De Pontigary*, 1 Sw. & Tr. 84; 2 Hagg. 618 (*supra*); Cf. *Hellier v. Hellier*, 1 Lee

§§1 ; also *Sudhinenadra Nath v. Arunendra Nath*, 84 C.I.J. 126, *suffra*.

Court-fees for grant of Administration pendentis lites :—Court-fees will have to be paid on the issue of a grant of administration pendentis lites, but when the proceedings terminate, the final grant will be made free of payment. *Maung Htin v. Maung Po Soen*, A.I.R. 1926 Bang 89—95 I.C. 541.

No appeal :—From order refusing to recall an administrator pendentis lites. A.I.R. 1955 Pat. 56.

Grants for special purposes.

248. [Pro. S. 35 & Suc. S. 219] If an executor is appointed for any limited purpose specified in the will, the Probate limited to purpose specified in will. probate shall be limited to that purpose, and if he should appoint an attorney or agent to take administration on his behalf, the letters of administration, with the will annexed, shall be limited accordingly.

N. B.—*Vide Notes on Clauses quoted under section 241, ante.*

For special purposes :—Where an executor is appointed for a special purpose, the probate shall be limited to that purpose only : *Re Thakur Madhavji, infra*. If the executor for a limited purpose appoints an attorney or an agent to take administration on his behalf, even such administration shall be limited accordingly. Where a testator leaves properties in different places and appoints an executor for each place, separate grants for each place will be possible under this section. Cf. *Re Maun*, 1891 P. 293 : *Re Tamplin*, 1894 P. 39.

Limited Grant, where executor appointed for a limited purpose :—This section contemplates the cases where the appointment is limited in ways more than one. It may be that the testator wanted the executor to act as such only for a certain period or in a certain place or in respect of certain properties only or it may be that he was to act upon the happening or otherwise of certain conditions. It has been held in *Re Thakur Madhavji*, 6 Bom 460, that Probate limited to part of the estate cannot be granted in cases where the whole estate is vested in the executor. The section has no application where the testator's direction was to pay certain debts out of a certain property. *Kappayammal v. Amani Ammal*, 22 Mad. 345.

249. [Pro. S. 36 & Suc. S. 220] If an executor appointed Administration, with will annexed, limited to generally gives an authority to an attorney or agent to prove a will on his behalf, and the particular purpose. authority is limited to a particular purpose, the

letters of administration, with the will annexed, shall be limited accordingly.

N.B. — "Curiously enough both section 86 of the Act of 1881 and section 220 of the Act of 1865 use the word 'attorney.' It would appear a drafting slip in the Act of 1881 and the words 'or agent' have been added"—*Notes on Clauses of the Original Bill*. This amendment must necessarily involve a change in the law.

This section embodies the principle that in all cases of grant to attorneys, only the grant follows the terms of the power—*Re Goldsbrough*, 1 Sw. & Tr., 295, per Sir O Creswell. Thus, where the executor directed his attorney to prove the will with respect to a specified property, a general grant cannot be made, but will be limited to that property only, see Coote's 16th Ed., p 142.

250. [Pro. S. 37 & Suc. S. 221] Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

N.B. — "The language of section 37 of the Act of 1881 has been adopted, but there is no change in the substance"—*Notes on Clauses of the Original Bill*. In the Act of 1881 the word "beneficiary" is used, so also here, but in the Act of 1865 occur the words "person beneficially interested." This involves no change in the law.

Scope of the Section:—It deals with those classes of cases where the deceased was possessed of properties which he held as a trustee without having any beneficial interest therein. For instance, where joint-stock company shares or Government securities were held by the deceased, as a trustee. Now, no trust being recognised in respect of these classes of properties, the trustee-holder's name appears in the share scrips or the notes as the actual owner, and on his death, dealing with these properties is impossible except by the legal representative of the deceased trustee-holder, and if he leaves no such representative or one who is unable or unwilling to act as such, then this section will enable the grant of administration to the beneficiary of such shares and securities, but such grant will be limited to those particular properties only. Cf. *De Silva v. De Silva*, 5 Bom. L.R. 784 (on appeal from 27 Bom. 103). From what has been said above it will appear that this section applies only to the property in which the deceased had ownership so as to constitute it a portion of his estate although he held it in trust, *M-hunt Jib Lal*

v. *Mohapat Joga Mohan*, 16 C.W.N. 798 : 16 I.C. 458 (distinguishing *Ranjit Singh v. Jayanath Brosad*, 12 Cal., 375), or in other words, it must be the "deceased's estate (though held in trust), otherwise this section will have no application. So, where a *mohu* dies, a person claiming to be his successor in office cannot apply for letters of administration under this section, for the simple reason that the deceased is not the owner of *matt* property, and it is not his estate, 16 C.W.N. 798 : 2 C.W.N. ccxxi, *supra*. The same view was taken also in *Parsannia v. Haricharan*, 17 C.L.J. 65 : 16 I.C. 688. But it has been held in *Ranjit Singh v. Jagannath*, *supra*, that an idol being the *cestui que trust* was a beneficiary within the meaning of this section, and as it could not manage itself, administration could be granted to someone on its behalf.—Cf. *Parmanundas v. Venayakrao*, 9 I.A. 86 : 7 Bom. 19. Where certain policies effected on the lives of individual partners out of the partnership funds and for the benefit of the partnership, have been found to be partnership property and one partner died leaving no general representative of his estate, the remaining partner can apply for a grant limited to the policies of the deceased, because a partner is a trustee of the partnership property standing in his name and no partner can be said to have any beneficial interest in any particular estate or property until the partnership is dissolved; *Adarji Mancherji Dalal, re*, 55 Bom. 795—33 Bom. L.B. 576 = A.I.R. 1931 Bom. 428 = 189 I.C. 845. This section will have no application to the case of a member of an undivided Hindu family, whose interest in the family property ceases immediately upon his death and passes on to the other members of the family, *Gopalaswami Pillai v. Meenakshi Ammal*, 7 Rang. 39 = A.I.R. 1929 Rang. 99 = 115 I.C. 805. The section is not concerned with the subsequent or ultimate devolution of property of which the deceased was a trustee. After the death of the trustee his heirs may derive benefit from the property of which he was trustee but that is no bar to the applicability of the section because so long as the trustee is there, he has no beneficial interest on his own account, *Adarji Mancherji Dalal, Re, supra*. As to when section 370 of the Act instead of this section will apply, see *Ghanashyam Das Soman, In re*, I.L.R. (1946) 1 Cal. 92.

Some other person:—That is a person other than a beneficiary, e.g. a new trustee or his nominees. A grant under this section can be made to the *cestui que trust* if the trust is at an end; *Pegg v. Chamberlain*, 1 Sw. & Tr. 527 (528), or to his nominees (note the words "on his behalf"). As this section becomes a matter for consideration in respect of *debutter* properties, it should be remembered that the office of *shebast* if not vested in outsiders' vest in the heirs of the founder, *Gossam v. Ramanlalji*, 16 I.A. 187 : 17 Cal., 8. For other cases regarding devolution of shebaitship, vide *Jagadindra v. Hemanta*, 32 I.A. 203 : 32 Cal. 129 ; 8 C.W.N. 809 ; *Ramachandra v. Ram*, 33 Cal., 507 ; *Sheoratan v. Ram Pargash*, 18 All., 227.

251. [Pro. S. 38 & Suc. S. 222] When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or

unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution.

Administrator ad litem:—This section is for the purpose of making provision for the representation of the deceased person in litigation and an administrator under this section becomes a party to the suit, and is commonly known as administrator *ad litem*. When a grant of this kind is made the grantee can only carry on the suit and has no right to receive the fruits of it. *In the goods of Dodgson*, 1 Sw and Tr. 910.

Effect of Grant under the section. A grant under this section lasts till the final decree is made and carried into complete execution, and is binding on the estate and on all future grantees (if any).

A District Judge cannot grant letters of administration under this section unless the deceased was a resident within the jurisdiction of his Court. *Ferdunji v. Navajbhai*, 17 Bom., 689.

When the Court grants limited administration and such an administrator is made a party to the suit, the estate of the deceased is represented in all respects to that extent only for which the administration is granted; *Faulkner v. Daniel*, 3 Pace, 208; *Devaynes v. Robison*, 24 Beav., 98. A limited administration of the description contemplated by this section is not sufficient when the suit involves enquiries as to the next-of-kin or as to assets and creditors, *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294; *Penny v. Watts*, 2 Ph., 149. Administration may be granted to the nominee of a plaintiff who is about to commence proceedings, *Howell v. Metcalfe*, 2 Add., 351. A grant under this section cannot be general, *Mac'eon v. Dawson*, 1 Sw. & Tr. 425. Before making a grant under this section, persons with prior interests must be cited, *Ibid.* If notwithstanding such citation, the executors do not turn up, the effect will be that the executors will be precluded from overthrowing the administrator *ad litem* by resort to a revocation proceeding under sec 268; of course, such late coming executors can obtain a supplementary grant without prejudicing the position of the administrator *ad litem*. *Musammat Golab Dayas*, *In re*, 48 C.W.N. 1198 = A.I.R. 1939 Cal. 718.

252. [Pro. S. 39 & Suc. S. 223] If, at the expiration of twelve

months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the State within which the Court which has granted the probate or letters of administration

exercises jurisdiction, the Court may grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

Sources of the Section:—The section is founded on secs. 1 and 3 of the English Statute, 38 Geo. III, C. 87 (an Act for the administration of the estate where the executor goes out of the Realm after obtaining probate).

Object of the Section:—The section provides for a speedy action when the executor is absent. It appears from the decisions of English cases *Rainford v. Taynton* 7 Ves., 460, as well as *Taynton v. Hanvay*, 8 Bos. & Pal. 26, that the authority of an administrator appointed under this section does not become void upon the death of the executor, the grant being made, not for a limited time, but for a limited purpose, viz. for becoming a party to a suit and carrying the decree which will be made therein into effect. For the definition of a *State*, *vide* sec. 2 (g) and notes at p. 11, *ante*.

Comparison between Secs. 251 and 252:—This section contemplates the case where the grantee leaves the State after obtaining grant. The preceding section deals with the case in which there has been no previous grant.

At the expiration of twelve months:—The expression means at or after the expiration of such period, *Re Ruddy*, 2 P. & D. 390.

253. [Pro. S. 40 & Suc. S. 224] In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate subject to the directions of the Court.

Nature and Object of Grant under the Section:—Grants under this section are called *ad colligenda bona* and their object is to preserve the deceased's estate from damage, waste or loss. It is, not necessary that the grantee should have any

To whom the grant can be made, interest in the estate. "Administration of this nature will be granted not only to any one whom the Court considers for

the occasion eligible, but will also be made to the persons who are entitled to a full grant or to entire strangers whom mere chance has brought into the affair." *Cootes' Probate Practice*, 16th Ed. p. 172. Also *see Re Don M.*

Gudolle, 3 Sw. & Tr. 22, and also *Re Clarkington*, 2 Sw. & Tr. 386. In *Re the Goods of Rolland*, 7 C.W.N. exct (1910), grant ad colligenda was made to a friend of the deceased who had before his death intimated his intention of making a will and also told the applicant he had no relation. The object in acting for the grant was to keep the property in safe custody safeguarding it until a next of kin had been found.

Power of administrator under this Section:—In the absence of special directions the administrator's power should be limited to collection and preservation of the estate and to giving discharge to debtors. But the Court can in its discretion enlarge such powers by suitable directions. Cf. *Re Don M. Gudolle*, 3 Sw. & Tr. 22; *Re Schwerdtfeger*, L.R., 1 P. & D. 424; *Re Stewart*, L.R., 1 P. & D. 727.

Discretion of the Court:—*Vida Sharp v. Wakefield*, (1891) A.C. 178; *Re Taylor*, 4 Ch. D 160. Cf. *Gangeshwar v. Durga Prasad*, 45 Cal 17 : 26 C.L.J. 667; 22 C.W.N. 74; 42 I.C. 849 (P.C.); *Brij Inder Singh v. Lala Kunshi*, 45 Cal 94; 26 C.L.J. 672; 22 C.W.N. 168 : 42 I.C. 48 (P.C.).

254. [Pro. S. 41 & Suc. S. 225] (1) When a person has died Appointment, as ad. intestate, "or leaving a will of which there is no administrator, or person executor willing and competent to act or where other than one who in ordinary circumstances, the executor is, at the time of the death of such would be entitled to person, resident out of the State and it appears administration. to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

(2) In every such case letters of administration may be limited or not as the Court thinks fit.

N. B — The section is founded on sec. 78 of the English Probate Act, 20 and 21 Vic., C. 77.

Essential requirements of the Section:—The section applies: (1) in case of intestacy, and (2) in case of testacy, (a) if there be no executor willing and competent to act, (b) if the executor is absent from the State, *Re Sawtell*, 2 Sw. & Tr. 448, and (3) it is necessary or convenient to appoint an administrator for the immediate protection of the estate, *Re Jones*, 1 Sw. & Tr. 18. These being the essential requisites of the section, it is necessary to aver specifically in a petition .

hereunder that the executor named in the will is not willing and competent to act. An allegation that the named executor has "slept over" the will rendering misappropriation of the trust funds by another executor possible is not in form but in substance in a substantial compliance with the requirements of the section. Such an averment, no doubt, is vague, but the defect may be cured by an amendment. *E. J. John v. Collector of Malabar*, I.L.R. (1944) Mad. 658-(1948) 2 M.L.J. 688-1948 M.W.N. 786-A.I.R. 1944 Mad. 189-215 I.C. 8. In the absence of the special circumstances mentioned herein, this section does not operate; so in order to warrant an appointment hereunder these special circumstances must be alleged and proved although the general section 276 contains no reference to them. *Ibid.* Absence of an executor willing and competent to act must refer to the point of time when the Court takes action and not when the testator dies. Therefore, the existence of such a willing and competent executor for some time before the Court proceeds to take action will make no difference. *Gnanamani Nadathi v. Esunadian Nadar*, A.I.R. 1928 Mad. 797-110 I.C. 489. Notice the word "and" which necessitates that the executor should not only be willing to act but also be competent to act. The words, "any part" show that an administrator can be appointed hereunder in respect of a fractional estate, see (1956) 1 M.L.J. 542-A.I.R. 1956 Mad. 411.

Object of the Section:—A grant under this section is made for the protection and preservation of the estate, *Re Kamineymoni*, 21 Cal., 697; *Re Jones, supra*; *Earl of Warwick v. Greville*, 1 Phllim, 126; *Re Abinash Mitter, infra*.

Other than person entitled:—The section contemplates a grant without recognising the legal title of the grantee, *Re Kamineymoni*, 21 Cal., 697. If necessity demands, the person legally entitled may be superseded and grant made to another under this section. *Annapurna v. Kallayani, supra*; *Ma Shws Yin v. Ma Cox*, 12 Bur. L.T. 39. Cf. *Re Fairweather*, 2 Sw. & Tr 588; *Re Richardson*, L.R. 2 P. & D. 244; *Re Hale*, L.R. 3 P. & D. 207; also see *Re Abinash Chandra Mitter*, 7 C. W. N. xxixiv (244) in which a grant was made to a person other than absolutely entitled; also *Re Makhun Brahamani*, 8 C.W.N. ccxxxviii in which a grant was made to a stranger; *Re Antherton*, 1892 P. 104 (in this case the grant was made to a creditor); *Re Taylor*, 1892 P. 90 (to a partner). Cf. *Re Suarez*, 1897 P. 82. The section does not contemplate that a petition hereunder can be made only by a person who seeks letters of administration in his favour. It is quite permissible for an applicant hereunder to ask for a grant in favour of a third party or even in favour of a public officer. *E. J. John v. Collector of Malabar*, I.L.R. (1944) Mad. 658-(1948) 2 M.L.J. 688-A.I.R. 1944 Mad. 189-215 I.C. 8. No grant ought to be made hereunder without issuing citation calling upon the next-of-kin to accept or refuse letters of administration. *Girijabala v. Manindra Lal*, 81 C.W.N. 874-A.I.R. 1927 Cal. 654-108 I.C. 692.

Instances of Persons appointed hereunder:—(a) The sister of an alleged

adopted son, *Ma Shan v. Ma Chit*, 10 Bur. L.T. 184 : 44 I.C. 188; (b) father-in-law of party entitled, *Re Cholwell*, L.R. 1 P. & D. 192; *Re Cavendish*, 5 C.W.N. 336; (c) the natural sister of a deceased prostitute, though the tie of relationship was severed by degradation, *Re Kamineymoni, supra*; *Re Paribatty Dassi, supra*; *Cf. Harlal v. Tripura Charan*, 40 Cal. 650 ; 17 C.L.J. 488 : 17 C.W.N. 670, F.B.; (d) an executor refusing office was granted administration *de bonis non*, under this section, *Re Makhan Brahmee, supra*; (e) the deceased's sister, *Re Crippen*, 1911 P. 108.

When this Section will not apply:—This section cannot be applied on the application of a person who is legally entitled to administration (Cf. secs. 218 and 219), *Haynes v. Mathews*, 1 Sw. & Tr. 462; *Annapurna v. Kallayans*, 21 Cal., 165; but see *Re Abinash Chandra Mitter*, 7 C.W.N. 202 (244), in which a grant was made to a person, other than one absolutely entitled. The Court cannot take action under this section on the ground that the applicant for probate is not a fit and proper person, inasmuch as action under this section can be justified only when the executor is absent or unwilling or incompetent to act, *Hara Coomar v. Dzorgamony* 21 Cal., 198. The bad character of the executor is no ground for exercising a discretion under this section Cf. *Re Samson*, L.R. 3 P. & D. 48. Where an application for probate was made (through their mother as next friend) by the minor sons of an adopted son of the deceased, who left a will appointing his wife and adopted son as shebaits, executrices and executor, but none of them took probate. The Court in its discretion under this section refused to make a grant, holding, (1) the applicants were not entitled to probate not being executors and (2) it was not a fit case under this section; *Narendra Paramanik v. Charu Paramanik*, 12 C.W.N. 747 : 7 C.L.J. 558 This section will not apply where persons entitled to administration are not wanting, *Bhagawati v. Bahuria*, (1920) Pat. 187 : 5 Pat. L.J. 847 : 57 I.C. 583 Cf. *Haynes v. Mathews*, 1 Sw. & Tr. 462 (463). *Vide* notes under the heading "Necessary and convenient," *infra*

Necessary and Convenient:—The Court will not make an appointment under this section unless such appointment is necessary or convenient having regard to the special circumstances of the case, *Re White*, 2 Sw. & Tr. 467; *Re Cooke* 1 Sw. & Tr. 267; *Re Bateman*, L.R. 2 P. & D. 242; *Bhagawati v. Bahuria, supra*; also the cases under the last heading. Where a Hindu governed by the Bengal school died intestate leaving 5 sons two of whom were of age, the Court granted letters of administration under this section to the father-in-law of the eldest son as in the discretion of the Court, this grant was considered *desirable*, *Re Abinash Mitter*, 7 C.W.N. 244 (notes). The Court will not consider an appointment necessary or convenient, simply because all the interested persons agree, *Re Richardson* L.R. 2 P. & D. 244. For further information on this subject *v.d.s* the English cases cited at p. 471, *ante*.

Discretion of the Court:—The Court has a very wide discretion in the matter of a grant under this section and can appoint a person other than one legally entitled, *vide Re Kamminy Money*, 21 Cal. 607; *Re Parbutty Dass*, 1 C.W.N. exiv. (114) and the cases cited under the heading "other than person entitled" at p. 471. But the discretion of the Court should not be arbitrary but judicial, *Haynes v. Mathews*, 1 Sw. & Tr. 462 (468), and the cases cited under the heading, "Discretion of the Court" at p. 470, *ante*; and controlled by a consideration of the protection of the estate, *Earl of Warwick v. Greville* 1 Philim., 125. *Re Abinash Mittra*, *supra*. The Court has no discretion under this section, when the application is not bona fide, *Narendra Pramanick's case*, *supra*. Cf. *Louis Kun'a v. Goelho*, 18 M.L.J. 158. In exercising discretion under the section the Court should have regard to consanguinity, amount of interest, safety of the estate and likelihood of proper administration, *Sivadas Mookhey v. Surendranath*, 40 C.L.J. 24—A.I.R. 1926 Cal. 178 : 82 I.C. 382. In making a grant under this section to persons not next-of-kin, nor legatees, the Court should see that the requirements of the section have been fulfilled and in default should down-right refuse to proceed in favour of those persons, as they are not ordinarily entitled to any grant, *Girijalala v. Narendra Lal*, 31 C.W.N. 874—A.I.R. 1927 Cal. 654—103 I.C. 692.

Sub-sec. (2) gives the Court a discretion in matter of putting limitations to the grant

Grants with exception.

255. [Pro. S. 42 & Suc. S. 226] Whenever the nature of the Probate or administrat. cass requires that an exception be made, probate tion, with will annexed, of a will, or letters of administration with the subject to exception. will annexed, shall be granted subject to such exception.

Grants subject to Exception:—This section applies only in cases of testacy, and deals with those cases only wherein certain properties have to be excepted from the letters of administration for special reasons, *Mt Lao Devs v. Jagatamla Devs*, 93 P.L.R. 803—A.I.R. 1936 Lah. 378—168 I.C. 666. For the circumstances where exceptions can be made, *vide infra*; also sec. 266, *infra*. In the *Goods of Suttya Krishna Ghosal*, 10 Cal. 554, the Court having regard to the facts and circumstances of the case directed the issue of letters of administration limited to the Government Securities and cash only, and held that the facts warranted such exception, [*Re Ram C. Seal*, 5 Cal. 2 not followed]. In *Re Thakur Dharmrai*, 6 Bom. 460, held Probate limited to part of the estate cannot be Where exception not granted in cases where the whole estate has vested in the made. executor, and no exception can be made as hereunder. Cf. *Mitchel v. Gard*, 9 Sw. & Tr. 75. In English cases we find the Courts have granted

probate to a part of the will only omitting certain clauses in them when it has been established that such clauses have found their way into the will either fraudulently or through some mistake or accident and the executor had no knowledge about them. *In Bonis Duane*, (1869) 2 Sw. & Tr. 590; *Harter v. Harter*, L.R., 3 P. & D. 11; *Re Oswald*, L.R. 3 P. & D. 162; *Barton v. Robins*, 3 Phill. 455. Probate may be granted of a portion of a will after striking out or omitting such portions of it as are proved to have been inserted in it without the testator's knowledge, *Girish Chandra v. Rashraj*, 1 C.L.J. 109; referring to *Rhodes v. Rhodes*, (1882) 7 App. Cas. 192; *Allen v. McPherson*, (1847) 1 H.L.C. 191, *Morrell v. Morrell*, (1882) 7 P.D. 68.

The Judicial Committee have held that when probate is refused in respect of a portion of the will, it may yet be issued in respect of the remainder, *Sarat Kumari Bibi v. Rai Sakhi Chand*, 56 I.A. 62-8 Pat. 382-93 O.W.N. 874-66 M.L.J. 180-81 Bom. L.R. 270-27 A.L.J. 187-A.I.R. 1929 P.C. 46-118 I.O. 471 (P.C.). A clause inserted in a will after execution, and not signed and attested was excepted in *Shan a Charan v. Khetromoni*, 27 Cal. 521. The name of a residuary legatee written by mistake under the attestation clause was omitted from the grant in *Re Sharman*, L.R. 1 P. & D. 661. For omission of offensive passages, see *Re Hcneywood*, L.R. 2 P. & D. 261; *Re Wartnaby*, 1 Rob. 423; *Marsh v. Marsh*, 1 Sw. & Tr. 528 (836). A person to whom coparcenary property has passed by survivorship has the right to apply for representation under this section or the next one, as the case may be, *Bai Ujambai v. Harak Chand*, 69 Bom. 644-87 Bom. L.R. 800-A.I.R. 1935 Pom. 242-166 I.C. 621. The section does not authorise grant of probate limited to a part of the deceased's estate to some of the executors who apply for it leaving out the other executors, *Amrit Rao v. Sangam Lal*, 1942 O.W.N. 480-A.I.R. 1943 Oudh, 161-204 I.C. 219. Different people cannot get individual letters of administration limited to the particular property which they happen to claim, *Gurijalala v. Manindra Lal*, 81 O.W.N. 874-A.I.R. 1927 Cal. 654-103 I.C. 692; the general rule in this connection is that except for special reasons and under special circumstances, a grant should embrace the entire property of the deceased, *Sotpalram v. Collector of Multan*, 12 Lab. 584-32 P.L.R. 893-A.I.R. 1931 Lab. 810.

¹ The section should not be so construed as to imply that it has conferred a jurisdiction on the Judge to go into the question of validity of the provisions of the will with reference to Hindu Law, *Mt Laxo Devi v. Jagatambha Devi*, 38 P.L.R. 803-A.I.R. 1936 Lab. 378-168 I.O. 656. A grant in respect of a fractional estate is possible hereunder, (1963) 1 M.L.J. 542-A.I.R. 1965 Mad. 411.

256. [Pro. S. 43 & Suc. S. 227] Whenever the nature of the case requires that an exception be made, letters of administration with exception shall be granted subject to such exception.

Scope of the Section :—This section as well as the preceding one are practically the same. The present one only relates to administration in cases of *intestacy* whereas the last one deals with administration in cases of *testacy*. Hence the decisions which are applicable to the preceding section are equally applicable to the present one.

The section seems to contemplate a case, where the testator has left a will for a particular purpose only and has died intestate as to the rest of his property and in those circumstances the next-of-kin may proceed to take administration under this section of all the properties without waiting for the executor to take the limited probate. (See *Coope's Probate* 16th Ed. p. 176) See also *Stoney v Stoney* 2 Pat 251 4 Pat. L.T. 161: (1928) Pat 150 A.I.R. 1928 Pat 348(2) 72 I.C 811. Ordinarily the grant should cover the entire estate unless the peculiar circumstances of a case justify a grant subject to exception. Cf *Re Ram Chand Seal*, 5 Cal 2 not followed in 10 Cal. 554, see at p 474, *supra*, *Re Girish Chandra*, 6 Cal., 483, *Re Thakur Dharmse*, cited under sec 255. As to the issue of a grant in respect of the remainder after refusal of grant in respect of a portion of a will vide *Sarat Kumar Bibi v Raja Sakhu Chand*, 56 I.A 62-Ac (P.C) cited at p 474, *ante*. A grant in respect of a part estate is possible hereunder, (1955) 1 M.L.J. 642-A.I.R. 1955 Mad. 411.

Whether there is a will or not a person to whom co-parcenary property has passed by survivorship has the right to apply for representation under the last section or this section, *Bas Ujambai v. Haral Chand*, 59 Bom 144-37 Bom. L.B. 300-A.I.R. 1935 Bom, 242-156 I.C 621.

Grants of the rest.

257. [Pro. S. 44 & Suc. S. 228] Whenever a grant with exception of probate, or of letters of administration with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

Grant Cæterorum —A grant of the rest is technically called a *grant cæterorum*. It is the grant of probate or administration following upon a limited grant. Thus, if a testator has appointed an executor for one specific purpose or a specific fund together with another executor for all other purposes or effects and the first mentioned executor has taken his limited probate, the other may take probate of the rest of the testator's effects. Further, when the deceased had made a will and appointed an executor for a special purpose or for a specific fund or property only

and has died intestate in all other respects, his next-of-kin, after the executor has taken a limited probate of the will, are entitled to administration of the rest of the effects of the deceased. *Copte's Probate*, pp. 161 & 162. Separate letters of administration can be granted under this section, where the deceased leaves a will, in respect of a portion of his properties and the rest has to be administered by a person other than the executor, *Stoney v. Stoney*, 2 Pat. 261 ; 4 Pat. L.T. 151 : (1928) Pat. 183 : A.I.R. 1928 Pat. 848 (2) : 72 I.C. 811. Where there has been a partial grant under, sec. 255 (old sec. 42 of P. & A. Act), the only application that should be entertained, in the absence of special circumstances, would be one under this section for a grant in respect of the rest of the testator's estate not covered by the grant under said sec. 255, *Girijabala v. Manindra Lal*, 31 C.W.N. 874 = A.I.R. 1927 Cal. 654 = 108 I.C. 692. For grant in respect of a fractional estate, see (1956) 1 M.L.J. 542 = A.I.R. 1955 Mad. 411.

Grants of effects' unadministered.

258. [Pro. 1 S. 45 & Suc. S. 229]. If an executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

Grant of effects unadministered or administration *de bonis non* :—Grants of effects "unadministered" are technically called grants *de bonis non-administration* or *de debonis non* or *de bonis*. *Nara Simmulu v. Gulam Hussain*, 18 Mad., 71. Grants of this nature are made by Courts when the sole executor dies without fully administering the estate of the deceased, *Re Mary Hemming*, 23 Cal. 579 ; *Re John Patterson*, 2 C.W.N. ccxxix (809) ; *Javerbai v. Kablebas*, 16 Bom., 896. But if there happens to be more than one executor then the necessity for a grant *de bonis* does not arise. Cf. *Re Reed*, 1896 P. 129. An administration *de bonis non* could be granted to an executor who had previously renounced, *Re Makhun Brahmanes*, 8 C.W.N. ccxxxviii (888).

In *De Souja v. Secretary of State*, 12 Beng. L.R. 428, Mepherson J. held that upon the death of an executor or administrator of a deceased person the estate of the latter is left absolutely unrepresented until some one comes forward and gets a grant of letters.

In *Bunjit Singh v. Jagannath P Gupta*, 12 Cal., 875 it was held that where the testatrix appointed an executrix for the Sheba of an idol with power to appoint the next shebait and the executrix died without appointing her successor to shebaitship the grant of letters of administration was justified under this section.

The section applies only in respect of unadministered effects. Inasmuch as no shebaits having been appointed there still remained some portion of the estate of the testatrix to be administered, vide notes under sec. 260, *supra*, at p. 467.

But in *Chandi Charan Mandal v. Banks Behari Mandal*, 10 C.W.N. 432, the testator died in 1884 and the widow, who was the executrix and also had direction to act as shebaits in respect of the worship of some idol took out probate in 1885 and died in 1902. The District Judge held that the Reversioner who was the petitioner before him was entitled to administration as the will contemplated some administration after the death of the widow and it was held the order was erroneous. The Court may presume properly in the absence of anything to the contrary and after this long lapse of time that the estate had been administered. Where administration was granted to the widow limited during minority of her son, who died a minor, and the estate remained unadministered, it was held that a *de bonis non* grant could be made, *Re Gopich Ch. Mitter*, 3 C.W.N. 681.

Has died:—The death of the executor to whom "probate" has been "granted" is not the only circumstance which "justifies a *de bonis non* grant. When such an executor is convicted, a *de bonis non* grant can be made, *Re Patterson*, 2 C.W.N. 669 (309).

May:—The word is not merely permissive, but directory, *De Scuza v. Secretary of State*, 12 B.L.R. 428.

Effects Unadministered.—This section applies only when there are unadministered effects, *vide Runjits case, supra*. *Lalit Chandra v. Barkunta*, 14 C.W.N. 463. So where there is no question of administration, this section has no application, *Re Nurseng Ohunder Bysack*, 3 C.W.N. 685. It is for this reason that a widow in possession of her husband's estate as an heir-at law and not as an administratrix, is not required to obtain permission of the Probate Court for dealing with the husband's estate, *Ibid.*, which she can easily do subject to the question of legal necessity. Lapse of long time since the death of the deceased raises a presumption of full administration, *Ritchie v. Rees*, 1 Add. 144; *Chandi Charan Mandal v. Banks Behary*, *supra*. But in cases of debulter and other endowed properties, which require perpetual administration, no such presumption arises from lapse of time, *vide Runjits Singh's case, supra*. Cf. *Parmanunddas v. Venayekrao*, 7 Bom. 19. Where the widow herself is the administratrix and her maintenance is charged on the estate, it cannot be said that the estate is not fully administered till her death, *Lakshmi Narain v. Nanda Bani*, 9 C.L.J. 116.

Powers of administrator *de bonis non*:—He has the same powers as an ordinary administrator, *vide* sec. 813, *infra*. While asking for a grant *de bonis non*, it is not necessary for him to ask for leave to dispose of property, *Re Mary Hemming*, 93 Cal., 572. *M. Gatherwood v. Chabond*, 1 B. & C. 150, 154. For

further information on this point, see *Fatherley v. Pate*, 3 Atk. 603; *Baroda Prasad v. Gajendra*, 13 C.W.N. 557 : 9 C.L.J. 888; *Gour Chandra v. Monmohini*, 25 C.W.N. 832.

259. [Pro. S. 46 & Suc. S. 290] In granting letters of administration of an estate not fully administered, the Rules as to grants of effects unadministered. Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Grants de bonis non to be like original grants:—Generally under the English Law* administration under this section is granted to those who have the greatest interest in the properties of the original intestate. Cf sec 264, *supra*. But the Court is not certainly bound to do so but has also a large discretion in the matter. If any mistake was made in the original grant the Court would make the necessary correction. In *Warren v. Kilxon*, 1 Sw and Tr. 290, the original grant of administration was made to one of the next-of-kin of the testator in the mistaken belief that he had not disposed of his residuary estate it afterwards granted administration *de bonis non* to the person whom the Court of Chancery had in the meantime decided to be a residuary legatee. See also *Ranjit v. Jagannath*, 12 Cal 376, *supra*; *Re Carr*, L.R. 1 P. & D 292. Where stamp duty was paid on the whole estate at the time of the original grant, no further duty will be necessary on the occasion of the *de bonis* grant. *Hurjbhoy's case* I.L.R. (1953) Bom. 748-55 Bom. L.R. 127—A.I.R. 1953 Bom 228.

260. [Pro. S. 47 & Suc. S. 231] When a limited grant has expired by efflux of time, or the happening of the event or contingency on which it was limited, and still some part of the estate unadministered. letters of administration shall be granted to those persons to whom original grants might have been made.

Supplemental or Cessate Grants:—Where a previous limited grant comes to an end by efflux of time or the happening of the contingency by which it was limited and there are still unadministered effects, a fresh administration can be granted to persons originally entitled to administration. The grant under this section is virtually a re-grant of the whole estate, and in this with *de bonis non* It differs from a grant *de bonis non* As seen under sec 268, a grants. *de bonis non* grant is for the purpose of administering the un-administered part of the estate ; but a cessate grant is not so limited, but is in respect

* *Strange v. Blythe*, 2 Hagg 160; *Re Middleton*, 2 Ellegg 61.

of the whole estate. Therefore, the value of the whole estate is to be taken for the purposes of stamp duty, though a part of the estate has been disposed of by virtue of the expired limited grant. Cf. *Abbott v. Abbott*, 2 Philim 678; *Re Bozara*, 3 B.W. & Tr. 175; see also *Himibhoy's case*, I.L.R. (1958) Bom. 746 = &c., *supra*.

Illustrations:—(a) A grant *durante minoritate* expires by the death of the minor or of the guardian or by the minor coming of age. Thus, where a grant was made to the widow during minority of her son, and the son died before attaining majority, it was held that she was entitled to a fresh grant under this section in respect of her husband's estate, *Re Krish Chunder Mittra*, 6 C.W.N. 681. (b) A grant during lunacy expires when the lunatic becomes sane, sec. 246; (c) For grant to attorney, *vide* notes under secs. 241 and 242. For other cases of limited grants, see secs. 289-290.

CHAPTER III.

ALTERATION AND REVOCATION OF GRANTS.

261. [Pro. S. 48 & Suc. S. 232] Errors in names and descriptions, or in setting forth the time and place of what errors may be the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

Rectification of Errors in Grants:—Errors in names and descriptions may crop up in many ways, e.g. where the names of the deceased may have been misspelled, the status of the deceased misstated, or the time of the deceased's death or the amount of the estate misrepresented. Also in limited grants there may have been a misdescription of the property to be administered, or there may have been misrecital of the power under which a will has been made, or of a deed by which a trust has been created. See Coote's 16th Ed. p. 229, *et seq.*; See *Re Towgood*, L.R. 2 P. & D. 408. All rectifications in grants should be made by the Probate Court. No other Court is competent to question the propriety or accuracy of a grant, *Sukumari Gupta v. Bharat Mandal*, 20 C.L.J. 148 : 26 I.C. 980.

In the *Goods of Alchin* (L.R. 1 P. and D., 684) the Court ordered a memorandum to be endorsed on a probate, after it had issued, regarding the true date on which a will was executed on its satisfaction that the date shown in the probate was erroneous. In the *Goods of J. White*, I.L.R. 4 Cal. 582, the Court allowed

further information on this point, see *Fatherley v. Rate*, 8 Atk. 608; *Baroda Frasad v. Gajendra*, 18 C.W.N. 557: 9 C.L.J. 383; *Gour Chandra v. Monmohine*, 26 C.W.N. 332.

259. [Pro. S. 46 & Suc. S. 230] In granting letters of administration of an estate not fully administered, the Rules as to grants of effects unadministered. Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Grants de bonis non to be like original grants:—Generally under the English Law* administration under this section is granted to those who have the greatest interest in the properties of the original intestate. Cf. sec 264, *supra*. But the Court is not certainly bound to do so but has also a large discretion in the matter. If any mistake was made in the original grant the Court would make the necessary correction. In *Warren v. Kikon*, 1 Sw and Tr 290, the original grant of administration was made to one of the next-of-kin of the testator in the mistaken belief that he had not disposed of his residuary estate it afterwards granted administration *de bonis non* to the person whom the Court of Chancery had in the meantime decided to be a residuary legatee. See also *Ranjit v Jagannath*, 12 Cal 376, *supra*; *Re Carr*, L.R. 1 P. & D 292. Where stamp duty was paid on the whole estate at the time of the original grant, no further duty will be necessary on the occasion of the *de bonis* grant. *Hirzelbhoys case* I.L.R. (1953) Bom. 748-56 Bom. L.R. 127—A.I.R. 1953 Bom 228.

260. [Pro. S. 47 & Suc. S. 231] When a limited grant has expired by efflux of time, or the happening of the event or contingency on which it was limited, and still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Supplemental or Cessate Grants:—Where a previous limited grant comes to an end by efflux of time or the happening of the contingency by which it was limited and there are still unadministered effects, a fresh administration can be granted to persons originally entitled to administration. The grant under this *Cessate grants compared* section is virtually a re-grant of the whole estate, and in this with *de bonis non* it differs from a grant *de bonis non*. As seen under sec 258, a grants.

de bonis non grant is for the purpose of administering the un-administered part of the estate; but a cessate grant is not so limited, but is in respect

* *Strange v. Blythe*, 2 Hagg. 150; *Re Middleton*, 2 Hagg. 61.

of the whole estate. Therefore, the value of the whole estate is to be taken for the purposes of stamp duty, though a part of the estate has been disposed of by virtue of the expired limited grant, *Cf. Abbott v. Abbott*, 2 Phiblin 678; *Re Fozara*, 8 B.W. & Tr. 176; see also *Hirjibkoy's case*, I.L.B. (1958) Bom. 748—*et seq.*, *supra*.

Illustrations:—(a) A grant during minority expires by the death of the minor or of the guardian or by the minor coming of age. Thus, where a grant was made to the widow during minority of her son, and the son died before attaining majority, it was held that she was entitled to a fresh grant under this section in respect of her husband's estate, *Re Grish Chunder Mittra*, 6 C.W.N. 661. (b) A grant during lunacy expires when the lunatic becomes sane, sec. 246; (c) For grant to attorney, *vide notes under secs. 241 and 242*. For other cases of limited grants, see secs. 289-240.

CHAPTER III.

ALTERATION AND REVOCATION OF GRANTS.

261. [Pro. S. 48 & Suc. S. 232] Errors in names and descriptions, or in setting forth the time and place of what errors may be the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

Rectification of Errors in Grants:—Errors in names and descriptions may crop up in many ways, e.g. where the names of the deceased may have been misspelled, the status of the deceased misstated, or the time of the deceased's death or the amount of the estate misrepresented. Also in limited grants there may have been a misdescription of the property to be administered, or there may have been misrecital of the power under which a will has been made, or of a deed by which a trust has been created. See Coote's 15th Ed. p. 229, *et seq.*; See *Re Towgood*, L.R. 2 P. & D. 408. All rectifications in grants should be made by the Probate Court. No other Court is competent to question the propriety or accuracy of a grant, *Sukumari Gupta v. Bharat Mandal*, 20 C.L.J. 148 : 26 I.O. 980.

In the *Goods of Allchin* (L.R. 1 P. and D., 664) the Court ordered a memorandum to be endorsed on a probate, after it had issued, regarding the true date on which a will was executed on its satisfaction that the date shown in the probate was erroneous. In the *Goods of J. White*, I.L.B. 4 Cal. 582, the Court allowed

amendment of error in the Probate. In this case the testator's will as drawn up contained a bequest to George Barney White the testator intending to bequeath to George Barney Ward. Before execution the word 'White' was struck out and 'Ward' written above and the alteration was initialled by the witnesses, but not by the testator. The probate contained the word 'White' only. On an affidavit by one of the witnesses the amendment was ordered.

In *Girindra Kumar v. Rajeswari Ray*, 27 Cal., 5, when there was a clerical error in the form of a probate granted, and the Judicial Commissioner refused to amend it because the grant was by his predecessor, it was held that though there was no appeal from such an order under sec. 299, post, yet the High Court might deal with the case in revision under section 115 of this C. P. Code and set aside the order. *N.B.*—Only such mistakes and errors can be rectified under this section as are evident. *Mellish v. Mellish*, 4 Ves., 49; *Phillips v. Chamberlain*, 4 Ves., 51 (67); *Re Scholt*, 1901 P. 191; *vide also* 4 Cal. 562, *supra*.

262. [Pro. S. 49 & Suc. S. 233] If, after the grant of letters of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended accordingly.

Procedure where codicil discovered after grant of administration with will annexed.

The procedure followed in England as laid down in Tristram and Coote's Probate Practice is as follows : If a codicil is found after probate of a will has been granted, a separate probate is granted of that codicil, and the first probate undergoes no alteration or amendment whatever. If, however, the appointment of the executors under the will is annulled or varied by the codicil, the probate must be brought in and revoked and probate will be granted anew of the will and codicil. Should an unattested or unexecuted paper incorporated by the testator in his will have been omitted from probate, it may be amended by engrossing the former into it.

263. [Pro. S. 50 & Suc. S. 234] The grant of probate or letters of administration may be revoked or annulled for Revocation or annulment for just cause.

Explanation —Just cause shall be deemed to exist where—

- (a) the proceedings to obtain the grant were defective in substance ; or
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ; or

- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ; or
- (d) the grant has become useless and inoperative through circumstances ; or
- (e) [Pro. A. of 1889, Ss. 2 & 11] the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations.

- (i) The Court by which the grant was made had no jurisdiction.
- (ii) The grant was made without citing parties who ought to have been cited.
- (iii) The will of which probate was obtained was forged or revoked.
- (iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.
- (v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.
- (vi) Since probate was granted, a later will has been discovered.
- (vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.
- (viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

Scope of Enquiry :—The only matter for consideration upon an application for revocation under this section is whether the applicant has made out a *just cause* for revocation. The application cannot be thrown out at this stage on the ground that the applicant has not adduced evidence sufficient to throw doubt upon the genuineness of the will, *Mokshadayne v. Karnadhar*, 19 O W N 1108; *Durgagati v. Sowrabini*, 83 Cal 1001 : 10 O W.N. 955; *Akhileswari v. Haricharan*, 40 O L J 297: A.I.R. 1925 Cal. 228. No question of genuineness of will arises for consideration till

the Court has decided that the grant of probate or letters of administration should be revoked on one or more of the grounds specified in this section, 40 C.L.J. 297 : 84 I.C. 689. This broad proposition is somewhat inconsistent with Illustration (iii) of the section, under which the question of genuineness of the will can be canvassed before the Court before actual revocation, see *Anil Behari Ghose v Lalita Bala*, 1955 S.C.A. 1026 = 1955 S.C.J. 578 = A.I.R. 1955 S.C. 666 = (1956) 2 M.L.J. (S.C.), 84, S.C. *supra*. If any one of the grounds mentioned in the section is made out in support of the application for revocation, the order for revocation should be made, *Kalmaddin v Hara Sundari*, 109 I.C. 248 (Cal.). If just cause is made out it will be proper for the Court to revoke the grant, *Priyanath Bhattacharji v. Sailabala Devi*, A.I.R. 1929 Pat. 385.

Revocation:—This section provides for the revocation of a grant on the ground of what is hereinafter called a *just cause*. For meaning of *just cause*, see *Hara Coomar v Doorgamoni*, 21 Cal., 195. The sort of grant, revocability whereof is contemplated by this section, does not include a grant of administration *ad litem* under sec. 251 on the recusancy of the executors or the possible administrators to act under the will; such a grant cannot be revoked hereunder at the instance of the executors who subsequently veer round, although a supplementary grant can be made in their favour keeping the administration *ad litem* in tact, *Mussmt. Golab Dyeey, In re*, 49 C.W.N. 1193 = A.I.R. 1989 Cal. 718 = 185 I.C. 841.

As the grounds of revocation stated in the section are exhaustive (*vide* under the heading "Explanation,") there cannot be any revocation. What are no grounds on any other grounds. So it has been held that a grant cannot be revoked on the ground that the executor has become immoral, *Mohun Das v. Latchman*, 6 Cal., 11. There cannot be any revocation of a probate by the Probate Court on the ground that the terms of a will are contrary to the provisions of Mahomedan Law, *Mahomed Renu Meah v. Sabida Khatun, infra*. No revocation on the ground of mismanagement by the executor, *Annadaprasad v. Kalikrishna*, 24 Cal., 95; maladministration is no *just cause* for revocation, *Gourchandra v. Sarat Sundari*, 16 C.W.N. 860 : 40 Cal. 60 : 15 I.C. 44. Mis-statement of the date of death in the application for grant is likewise no *just cause*, *Manu Abu v. Beebee*, 4 Bur. L.J. 73. A probate can be revoked only by the Probate Court and not collaterally in another proceeding, *Mahomed Renu Meah v. Sabida Khatun*, 29 C.L.J. 37 : 29 C.W.N. 668 : 49 I.C. 128. *Vide* also under the heading "Grant cannot be collaterally attacked". Though the Official Trustee of Bengal may not be authorised to accept probate, the judge cannot be said to have acted without jurisdiction in granting probate to him, and hence the probate cannot be revoked, *Official Trustee v. Kumudin Das*, 87 Cal., 887 : 6 I.C. 973. Appropriation of assets by the legatee-executor before paying off debts may be a ground for revocation, *Iswar Singh v. Harkishen Lal*, 84 P.W.R. 1915 : 179 P.L.R. 1915 : 29 I.C. 754. A right to ask for revocation is not lost if

the petitioner for revocation acts in concert with somebody, *Sharasibala v. Annada-moysi*, 12 C.W.N. 6. Vide notes under the heading "Joint Curse," *infra*. A grant in violation of sec. 298, *infra*, is liable to be revoked Cf. *Iswar Singh v. Harkishen Lal*, 84 P.W.B. 1915 : 29 I.C. 754, *supra*; *Re Jenkins*, 3 Phill. 89; *Re Bradshaw*, 13 P. & D. 18. A grant obtained surreptitiously (*e.g.* pending a Caveat or pending a contest) is revocable, *Trimblestown v. Trimblestown*, 8 Hagg. 243. Cf. *Mokshadayani v. Karnadhar*, 19 C.W.N. 1108 : 81 I.C. 702. When letters of administration are wrongly granted, the proper course will be to apply for revocation of the same, *Daropit v. Santi*, A.I.R. 1929 Lah. 483—116 I.C. 452. There may be revocation apart from this section and on review under section 114 of the C.P. Code or in the exercise of inherent power under sec. 161 of that Code, *Parman v. Nekram*, 37 All. No revocation *Suo motu*. 380 : 19 A.L.J. 44 : 29 I.C. 193; *Kyone Hos v. Kyonsoon*, 3 Rang. 261.

But the distinction between the grounds of revocation hereunder and those for revocation upon review, should be appreciated, *Venkina v. Letchana*, A.I.R. 1939 Rang. 215—182 I.C. 827 and the necessity for adopting different procedures in the two cases should also be realised, *Ibid*. The Court cannot commence a revocation proceeding of its own motion, *Sarat Sundari v. Umaprasad*, 81 Cal. 526 : 8 C.W.N. 579.

No Revocation when no grant issued:—Revocation of probate which was never issued is without jurisdiction, *Jamsetji v. Nasurwanji*, 87 Bom. 158 : 16 Bom. L.R. 192 ; 19 I.C. 406.

Partial Revocation:—See *Iswar Singh v. Harkishen Lal*, 84 P.W.B. 1915 : 29 I.C. 754, *supra*.

Procedure:—Where a probate is sought to be revoked on the ground of the invalidity of the will, the proceeding should be initiated in the form of a suit as provided for in the O.P. Code, *Re Harendra Krishna*, 5 C.W.N. 383. For the procedure to be adopted for an application under this section, *vide Re Mohendranarain Roy*, 5 C.W.N. 377. Proceeding for revocation on the ground of irregularity merely should be started by motion on notice and not by a rule *nisi*, *Ibid*. The Court cannot start revocation proceeding of its own motion, *Sarat Sundari v. Umaprasad*, 8 C.W.N. 578 (*Supra*). Where a probate granted by the High Court is sought to be revoked the proper procedure is to file a petition under the Testamentary and Intestate Jurisdiction of the High Court and not a suit on the Ordinary Original Side, *Nurbheram Jivram v. Jevallalh*, 85 Bom. L.R. 998—A.I.R. 1933 Bom. 469—147 I.C. 362. Where probate was granted in common form and an application for revocation was made twenty years after for want of special citation on two minors, the proper procedure for the Court to adopt would be to call on the executor to prove the will in the revocation proceeding, *Aswini Kumar Chakravarti v. Sukharan Chakravarti*, 86 C.W.N. 568—A.I.R. 1931 Cal. 717—185 I.C. 286. A proceeding for revocation and not a regular suit would be the proper procedure.

Parties to Revocation proceeding:—The executor, the administrator, and all persons deriving a title from such executor or administrator (e.g. an assignee from the executor), and persons likely to be affected by the reversal of the grant are necessary parties, *Kashi Ohunder v. Gopi Krishna*, 19 Cal., 48. If necessary parties are not impleaded in the revocation proceeding, it would fail and administration order would follow, *Kulmaddin v. Hara Sundari*, 109 I.C. 248, (Cal.).

Court's Power of Revocation:—Such power is discretionary, *Mona Abu v. Bishes*, 4 Bur. L.J. 78; *George Anthony v. Millicent Spencer*, 35 Bom. L.R. 708 = A.I.R. 1933 Bom. 870 = 149 I.C. 251, but see *Priyanath Bhattacharji v. Sailabala*, A.I.R. 1929 Pat. 385. As the power is discretionary, the Court should not allow revocation on the ground that an inaccurate inventory is furnished, especially when an accurate one is not possible in the circumstances of the case, *Maddali Venkataswamy v. Vellampalli*, 34 I.C. 435 (Mad.). The Court cannot act *suo motu*, *vide supra*.

Apart from this section, notwithstanding its exhaustive character, the Court has inherent jurisdiction to withdraw (i.e. revoke) a grant Inherent power to withdraw grant. which was made in violation of the conditions on the fulfilment whereof alone the grant could be made, just to prevent the abuse of the processes of Court, *Prem Sukh v. Mt. Farhati*, 7 Lah. 270 = 27 P.L.R. 384 = A.I.R. 1926 Lah. 362 = 94 I.C. 329.

No revocation or no refusal of grant on the ground of prejudice to the creditor of the heir of the testator:—Probate of genuine will cannot be refused or revoked on the ground that otherwise the creditor of the heir of the testator will be deprived of his means of realising his dues, *Southern Bank Ltd. v. Kesardas*, 62 C.W.N. 444 = A.I.R. 1958 Cal. 877.

Notice:—Of the application for revocation should be given, *Parman v. Nekram*, 37 All., 380 : 19 A.L.J. 44 : 29 I.C. 133. Once the Court has made a grant, it cannot revoke it without giving notice to the grantee, *Ibid.*

Onus of Proof:—The onus is on the applicant to substantiate the grounds on which revocation is prayed for, there being a natural presumption of the regularity of the previous judicial proceeding under sec. 114 of the Indian Evidence Act, see *Bhagirathi v. Ghisa Singh*, 47 I.C. 174; *Lachko Bibi v. Gopinarain*, 23 All., 472; *Komollochun v. Nilrutton*, 4 Cal., 860; *Sukh Dei v. Kedarnath*, 23 All., 405; *Barry v. Bullin*, 1 Curt. 698 : 2 Moo P.C. 480. The question of onus becomes a bit complicated when revocation is sought on two grounds, viz. (i) non-citation and (ii) forgery of the will. If these two issues are tried separately and the plaintiff succeeds on the first issue, revocation will follow, but still it would be open to the defendant to prove the will and if he succeeds, the probate will stand. If the

plaintiff fails on the first issue, then it will be open to him to substantiate his second ground, namely, that the will was a forged one, and the onus will be on him to prove the forgery, and in the event of his success, the probate falls, but otherwise it stands. If the two issues are tried together and the plaintiff succeeds on the first, the onus of proving the genuineness of the will, will be on the defendant, *Mahomed Ibrahim v. Bholanath*, 50 C.W.N. 428; *Ramanand Kuer v. Kalawali Kuer*, 55 I.A. 18-7 Pat. 221-47 C.L.J. 171-82 C.W.N. 402-54 M.L.J. 281-1928 M.W.N. 282-30 Bom. L.R. 227-26 A.L.J. 385-5 O.W.N. 96-A.I.R. 1928 P.C. 2-107 I.O. 14 (P.C.). Read in this connection the cases under the heading, "Onus of Proof" under sec. 283, post. An applicant for revocation takes upon himself the burden of displacing the direct and positive evidence adduced in the case regarding execution and attestation, *Kristogopal v. Baidynath*, I.L.R (1959) 2 Cal. 179-A.I.R. 1939 Cal. 87-181 I.O. 8.

Grant of Probate is a Decree:—A grant of probate is a decree and cannot be set aside except on the ground of fraud or want of jurisdiction, *Kommollochun v. Niluttan*, 4 Cal. 360. A probate proceeding is *quasi in rem*, it binds parties who appear, as well as those who are cognisant of it, *Kunjo Lal v. Kailash Ch.*, 14 C.W.N. 1068.

Grant obtained by fraud:—Is void *ab initio*. *Debendranath v. Administrator-General*, 35 I.A. 109 : 35 Cal., 955, P.C. (on appeal from 93 Cal. 718 : 3 C.L.J. 422 : 10 O.W.N. 678).

Which Court to revoke:—Only the Court which made the grant can revoke it, *Kommollochun v. Niluttan*, *supra*. Cf *Kamona Sundari v. Hurrohal*, 8 Cal., 570; *Nobin Chunder v. Bhaba Sundari*, 6 Cal., 460 (462-63). Vide also the notes under the heading "Grant cannot be collaterally attacked" below. If an application for revocation is made to any other Court, that Court will refer the applicant to the Court which made the grant in order to observe a comity between jurisdictions, disregard whereof is calculated to lead to most unfortunate friction, *Sarajini Dassi, Re*, 46 O.W.N. 757. This rule is however subject to this consideration that a revocation application renders the proceeding contentious incapacitating a District Delegate to deal with it any more, see *Kailash Chandra v Nanda Kumar*, 48 C.W.N. 751-A.I.R. 1944 Cal. 386, cited under sec. 272, post. Under sec. 264(1), all District Judges have jurisdiction in revoking probates and letters of administration.

Grant operative until revoked:—A general grant made under section 269 is operative under sec. 216 until the grant is revoked or recalled on one or other of the grounds mentioned in this section, *Rani Hemangini v. Sarat Sundari*, 84 C.L.J. 457 : 66 I.O. 882. Cf *Forbes v. Peterson*, I.L.R. (1841) 2 Cal. 1-45 C.W.N. 739-A.I.R. 1941 Cal. 417-196 I.O. 111. The Court will not make a new

grant unless the grant originally made is revoked, *Rains Commissary of Canterbury*, 7 Mad. 146 (147). Cf. *Sarada Kanta v. Gobindmohan*, 12 C.L.J. 91; *Kunja Lal v. Kailash Chandra*, 14 C.W.N. 1068.

Grant cannot be collaterally attacked:—If a grant is wrongly made the proper procedure is to apply for revocation under this section, and not to challenge its legality in a collateral proceeding. Thus, where a grant is made to a widow, the reversioners cannot question the propriety of the grant in a No civil suit but only a Revocation proceeding. *Anand Charan v. Atul Chandra*, 28 C.W.N. 1045; 31 C.L.J. 3 : 64 I.C. 197. Likewise, a suit for declaration that the grant is invalid cannot be maintained in a Civil Court, *Mahomed Renu Meah v. Sabida Khatun*, 29 C.L.J. 37 : 29 C.W.N. 658 : 49 I.C. 128. It seems to be the intention of the Legislature that no civil suit should be maintained to revoke a probate on any ground and a party aggrieved by a grant should seek his remedy hereunder, *Pannalal v. Hansraj Gupta*, I.L.R. (1940) 1 Cal. 14 = A.I.R. 1940 Cal. 286 = 188 I.C. 674. Similarly, in a suit for rent by the grantee of probate, a defence that the grant was obtained by misrepresentation cannot be taken, *Ambica Charan v. Kala Charan*, 10 C.W.N. 422. Cf. *Rajib Panda v. Lakhon*, 27 Cal. 11. Where a grant is challenged on the ground that the will is a forgery the proper procedure will be a revocation proceeding hereunder and not a civil suit, *Kailash Chandra v. Nanda Kumar*, 48 C.W.N. 751 = A.I.R. 1944 Cal. 385. In one case, the Calcutta Court has held that where the grant was without jurisdiction (and a nullity), as for example where a grant was made in the case of survivorship (read the notes at pp. 370-71, ante) it could be challenged even in a collateral proceeding without formally getting it revoked by a proceeding hereunder, *Durga Prasad v. Jewdhari Sing*, 62 Cal. 733 = 61 C.L.J. 593. The reason for the view is that a grant which is void *ab initio* can always be ignored, *Ibid.* According to the Bombay Court, a proceeding hereunder and not a regular suit is very often the appropriate remedy for getting rid of a wrong grant, but under special circumstances, the remedy may be sought for by a regular suit as well, *George Anthony Harris v. Millicent Spencer*, 35 Bom. L.R. 708 = A.I.R. 1933 Bom. 370 = 149 I.C. 251.

Object of Citation:—The object of citation is that all persons who are interested in the estate or who may be adversely affected by the grant, shall have notice of the probate proceeding and an opportunity of intervening for the protection of their interests, *Akhileswari v. Hari Charan*, 40 C.L.J. 297 : A.I.R. 1925 Cal. 228 : 84 I.C. 689 ; *Srish Chandra v. Bhabatarini*, 48 C.L.J. 262 = 32 C.W.N. 998 = A.I.R. 1928 Cal. 695 = 114 I.C. 794.

Non-citation, if a ground for revocation:—Omission to serve notice is not by itself a sufficient ground for revocation of probate, *Nalini Sundari v. Bejoy Kumar*, 21 C.L.J. 555 : 90 I.C. 12 ; *Abhoya Charan v. Saroja Sundari*, 41 Cal. 619 :

24 I.C. 27 ; Shoroshibala v. Anandamoyi, 12 C.W.N. 6; **Eussoof Ahmed v. Ismail Ahmed,** 1938 Rang. L.R. 860 = A.I.R. 1938 Rang. 261 - 176 I.C. 614 (F.B.); **Mutukdhari v. Prem Debi,** A.I.R. 1959 Pat 570; this will be so when the citation is discretionary as under sec 288, but where citation is necessary, or compulsory as under sec 229, omission to issue citation will be a just cause, **Digambar v. Narayana,** 18 Bom. L.R. 88 : 9 I.C. 354; **Priyanath Bhattacharji v. Sailabala Devi,** A.I.R. 1929 Pat. 385. Read also **Dinobandhu Roy v. Sarala Sundari,** I.L.R. (1940) 1 Cal. 88 - 71 C.L.J. 25 - 44 C.W.N. 149 = A.I.R. 1940 Cal. 296 - 188 I.C. 787; **George Anthony Harris v. Millicent Spencer,** 36 Bom. L.R. 708 = A.I.R. 1938 Bom. 370. On the basis of the same fundamental distinction between optional and compulsory citations, it has been held that a grant of administration with the will annexed without citing the executor appointed by the will and calling upon him to accept or renounce his office is defective, **Hormusji v. Dharbarji,** 12 Bom., 164, but if the party was otherwise aware of the proceeding, absence of a special citation will not give rise to a just cause, **Premchand v. Surendra Nath,** 7 C.W.N. 190; **Abhoy v. Saroja,** 41 Cal. 819; **Rallabandy v. Yanamandra,** 46 M.L.J. 388 ; 84 M.L.T. 141 : A.I.R. 1924 Mad. 578 : 79 I.C. 44. See also **Shyama Charan v. Pranfulla Sundari,** 19 C.W.N. 882 : 21 C.L.J. 557 : 80 I.C. 161; **Re Bhuggobal Dasi,** 27 Cal. 927 : 4 C.W.N. 757. Generally speaking absence of necessary citation makes the proceedings defective and liable to be revoked as a ground for revocation, **Priyanath Bhattacharji v. Sailabala Devi, supra;** **Re Gunga Bisser,** 2 C.W.N. 607; **Draupadi Dasi v. Rajkumari,** 22 C.W.N. 564; **Re Nemaichand Bysack,** 5 C.L.J. 560, although want of citation will not by itself vitiate the probate, **Azimunnisa Begum v. Ali Khan,** 29 Bom. L.R. 434 = A.I.R. 1927 Bom. 387 - 102 I.C. 129. The sin of omission to cite is not necessarily always non-pardonable. There may always be attenuating circumstances to mitigate this evil. What these attenuating circumstances are depend upon the facts of each individual case. Delay in applying for revocation which amounts to waiver or acquiescence would be one such circumstance. Knowledge of the probate proceeding would be another, and so on. **Dinobandhu Roy v. Sarala Sundari,** I.L.R. (1940) 1 Cal. 88 - 44 C.W.N. 149 - 71 C.L.J. 25 = A.I.R. 1940 Cal. 296 - 188 I.C. 787. When the will was proved in common form and an application for revocation was made twenty years after on the ground that special citations had not been issued on two persons who were minors at the time the probate was granted, the proper procedure to adopt in the case would be that mentioned at p. 483, under the heading, "Procedure", see **Aswini Kumar Chakravarti v. Sukhaharan,** 86 C.W.N. 508 = A.I.R. 1931 Cal. 717 - 195 I.C. 286. Subject to what has been said above omission to cite those who ought to have been cited would entitle them to ask for recall of the grant, **A.B. Neogi v. B.B. Neogi,** 14 Rang. 146 = A.I.R. 1936 Rang. 105 - 161 I.C. 629. Citation should give the party cited sufficient opportunity to contest the validity of the will, that is, citation should be of such a character as to invite opposition, **Srish Chandra v. Bhabatarini,** 48 C.L.J. 262 - 82 C.W.N. 993 = A.I.R. 1928 Cal. 695 - 114 I.C. 794. If the parties not cited do not themselves object to the grant, the grant cannot be

revoked for such non-citation, *Ranmaya Gaorangini v. Betty Mahbert*, 81 C.W.N. 180—A.I.R. 1927 Cal. 207—100 I.C. 177. A party standing by inspite of knowledge of the probate proceeding, cannot make any grievance on account of non-citation, *Narendra Nath v. Fakermani*, A.I.R. 1952 Cal. 20. A minor, if not cited, can, on coming of age, compel the executor to prove the will in solemn form in his presence, *Rebells v. Rebells*, 2 C.W.N. 100; *Nistarini v. Brohmomoyi*, 18 Cal., 45; *Palini v. Bejoy Kumar*, 11 I.C. 277; *Azimuddin Begum v. Ali Khan*, *supra*. Non-citation is no ground for revocation where the party had parted with his interest by sale, *Mangla Gawa v. Somson*, 57 I.C. 24. A grant made after issuing citation to the nearest agnate of the deceased cannot be sought to be revoked by the son of such agnate on the ground that no citation was issued to him, *Bibhuti Prasad v. Pan Kuer*, A.I.R. 1930 Pat, 488—125 I.C. 774. Cf. A.I.R. 1964 Pat. 270.

Effect of Revocation:—Revocation of a grant has the effect of reviving the original proceeding, [*Brindaban Chandra v. Sureswar Shaha*, 10 C.L.J. 263], in order to give the executor an opportunity to prove the will in the solemn form, [*Abhoya Charan v. Saroja Sundari*, 41 Cal., 819 : 24 I.C. 27] Read *Ramanandi Kuer v. Kalwati Kuer*, 55 I.A. 18—47 C.L.J. 171—82 C.W.N. 402, P.C. When a grant is recalled, the onus of proving the will is upon the persons who propound the will. It is for such persons to prove that the will is a genuine one and not for the other party to prove that the will is a forgery, *A. B. Neogi v. B. B. Neogi*, *supra*. Where a grant is revoked, the Court has jurisdiction to entertain a fresh application for the same object, *Brijlal v. Secretary of State*, 20 All., 109. Where a probate is issued without citing a necessary party, and it is subsequently revoked on that account, such revocation of a probate does not render invalid any charge created by the executor when the probate was in force, *Golinda Mohan v. Mayunnessa*, 7 I.C. 9 (Cal.); also *Gopal Das v. Badree Das*, 33 Cal., 667 : 10 C.W.N. 662 (this is a case of sale)—following *Boxall v. Boxal*, 27 Ch. D. 220; *Craster v. Thomas*, (1909) 2 Ch., 348; *Sailaja v. Jadunath*, 19 C.W.N. 240 : 27 I.C. 715. The revocation has no retrospective effect and does not necessarily invalidate the past transactions of the executor, *Ma Thein v. Nepean*, 8 Rang. 468—A.I.R. 1981 Rang. 15—128 I.C. 359. That is, the revocation makes the grant void only as from the date when it is made and not void *ab initio*. *Akshay Kumar Pal v. Nandalal Das*, I.L.R. (1946) 1 Cal. 432. All mesne dealings in due course of administration and with persons acting in good faith up to the date of revocation will stand good. *Ibid.* The validity of a decree against an executor is not affected by the subsequent revocation of the probate. It is binding on the estate and on all subsequent representatives of the estate, *Ma Thain v. Nepean*, 9 Rang. 360—A.I.R. 1981 Rang. 283—183 I.C. 494—following *Hewson v. Shelley*, (1918) 2 Ch. 884, S.C. (1914) 2 Ch. 13; *Allen v. Dundas*, 9 T.R. 125. A judgment against an outgoing grantee is binding upon an incoming grantee, *Dai Meherbai v. Magan Chand*, 29 Bom., 96. But where the grant is void *ab initio*, as when obtained by fraud, all the acts of the grantee are absolutely invalid, *Debendra Nath Dutt v. Administrator-General*, 85

I A. 109 : 85 Cal. 955, P.C. (an appeal from 83 Cal. 718 : 8 C.L.J. 422 : 10 C.W.N. 678); *Ellis v. Ellis*, (1905) 1 Ch 618; notice that this view is not inconsistent with *Hewson v. Shelley*, (1918) 2 Ch., 384 ; (1914) 2 Ch 18 ; *supra*.

Res judicata :—An order passed after contest in a probate proceeding is *res judicata* in a subsequent proceeding. Such a decision is binding on all parties who had an opportunity of putting forward their objections unless they can make out a good cause under this section for setting it aside. Though there is no limitation for an application for revocation (*vide infra*), still such an application may be barred by *res judicata*. The principle of *res judicata* will apply even when the party omits to put forward his objections inspite of opportunity to do so. *Rallabandy v. Yanamandra*, 46 M.L.J. 383 : A.I.R. 1924 Mad. 578 : 34 M.L.T. 141 : 79 I.C. 44. Cf. *Dwijendranath v. Goloknath*, 19 C.W.N. 747 : 21 C.L.J. 287 : 28 I.C. 574 ; *Kunjolal v. Kailash*, 14 C.W.N. 1068. If a person had an opportunity to contest a will, but neglects to utilise that opportunity, he has to thank his own laches if he finds himself subsequently debarred from agitating over the same cause. *Venkana v. Letchana*, A.I.R. 1939 Rang. 245—182 I.C. 827. *Comp Forbes v. Peterson*, cited at p 494 (bottom), *post*. A previous application for revocation on the ground that the executor was guilty of mal-administration was refused, subsequently, another application for revocation was made on the ground that the will was a forgery, and it was held that the second application was not barred by constructive *res judicata*, as there was no obligation to take the latter ground in the first application. *Khiradamoys v. Bagala Sundari*, 4 C.L.J. 492 ; Cf. *Abdul v. Mg. Min*, 12 Bur. L.T. 114 ; 51 I.C. 355. A decision in a contentious letter of administration case to the effect that a person was a particular relation of the deceased and as such the nearest heir is binding on those who claim through the party contesting the relationship. *J. O. Galstaun v. Prafulla Kumar*, 36 C.W.N. 683—following *Kalipada De v. Dwijapada Das*, 57 I.A. 24—34 C.W.N. 201, P.C.

The bar of *res judicata* arising against a party who has once unsuccessfully attempted to get a probate revoked is not removed by the fact that another party has secured a revocation of the grant. The revocation of grant at the instance of one party is not a revocation for all persons and will not enlarge the rights of a previous unsuccessful applicant for revocation to re-agitate the matter by entering fresh caveat to the probate proceeding re-opened at the instance of the other party, *Re Raykrishna Mukherjee*, 39 C.W.N. 1071. An order discharging caveat on the ground of want of interest is *res judicata* in a revocation proceeding by the defeated caveat, *Pradip Kumar Sarkar v. Umaran Bose*, A.I.R. 1969 Cal. 277.

Effect of finding in a Revocation Proceeding :—Read *Pratap Chandra v. Kali Bhanjan*, 4 C.W.N. 600 ; *Contra*, *Sheikh Ajim v. Chandra Nath*, 8 C.W.N. 748—read the comments on these cases in *Khiradamoys v. Bagala Sundari*, 4 C.L.J. 492 ; read

also *Pannalal v. Hemraj*, I.L.R. (1940) 1 Cal. 14 = A.I.R. 1940 Cal. 286. Cf. 88 Mad. 203; 51 I.C. 355 (Bur.).

Minor not Represented:—If a minor is not properly represented in a probate proceeding, he can ask for revocation. *Naba Gopal v. Sri Gopal*, 28 C.L.J. 79 : 88 I.O. 14; *Sachindra v. Heronmoyee*, 24 C.W.N. 588 : 59 I.O. 435; *Dwijendranath v. Goloknath*, 19 C.W.N. 747 : 21 C.L.J. 287 : 28 I.O. 574; *Haimabati Mitra v. Kunjamohan Das*, 95 C.W.N. 387 = A.I.R. 1931 Cal. 713 = 185 I.C. 282. But compare *Radhashyam v. Banga Sundari*, 24 C.W.N. 641 : 59 I.O. 664; In this case it has been maintained that unless there is a contest in a probate proceeding, there is no obligation to get a guardian *ad litem* for a minor under O.XXXII, of the O. P. Code, 1908. Cf. *Rebells v. Rebells*, 2 C.W.N. 100; *Brindaban v. Sureshwar*, 10 C.L.J. 263. The necessity of getting the minor represented by a guardian *ad litem* has been pointed out also in *Akhileswar v. Haricharan*, 40 C.L.J. 297; A.I.R. 1926 Cal. 223 : 84 I.O. 689. Cf. *Harstaran v. Basanta Kumari*, 61 O. 164 (Cal.); *Shoroshibala v. Anandamoyi*, 12 C.W.N. 6. Where citation for the minor was issued and served on his guardian-mother, who lived under the protection of the propounder and there was no formal appointment of guardian, the Court revoked the grant, *Haimabati Mitra v. Kunjamohan Das*, *supra*.

Where a *de facto* guardian had been acting on behalf of the minor and in his best interests in the probate proceeding, absence of a formal order appointing guardian *ad litem* will not vitiate the proceeding. *Ranmaya Gao angini v. Betty Mahbalt*, 81 C.W.N. 160 = A.I.R. 1927 Cal. 207 = 100 I.O. 177—following *Walian v. Banke Behari*, 30 Cal 1021 (P.C.); *Contra, Azimunnissa Bibi v. Ali Khan*, 29 Bom. L.R. 434 = A.I.R. 1927 Bom. 887 = 102 I.O. 129.

Locus Standi:—A person who is adversely affected by a will is entitled to enter a caveat and to oppose a grant, and necessarily to ask for revocation, if a grant is unjustly made, *Nabin Chandra v. Bhala Sundari*, 6 Cal., 460 (464); *Kamona Sundari v. Hurro Lall*, 8 Cal. 570 (575). If a grant bids fair to defeat a man's title, he will have a right to intervene and to ask for revocation, *Kishen Dasi v. Satyendranath*, 28 Cal. 441; *Draupadi Dasya v. Rajkumari*, 22 C.W.N. 564. In order to have *locus standi* a man must have sufficient interest in the deceased's estate, 6 Cal., 460, *supra*; *Narain v. Mullan Ohand*, 16 C.W.N. 1099 : 15 I.C. 686. Therefore, the widow of a predeceased son who has no interest in her father-in-law's estate, has no *locus standi*, *Re Gobinda Babaji*, 17 C.W.N. 1141, but see *Indutaa v. Panchumani*, 19 C.W.N. 1169. Cf. *Parman v. Nekram*, 87 All. 880 : 12 A.L.J. 44 : 29 I.O. 183; *Baijiratna Shahas v. Deshperty Singh*, 2 Cal., 208; *Kommol Lechun v. Nilruttan*, 4 Cal., 360; *Nilmoney Singh v. Umanath*, 10 Cal., 19; *Rahamtulla v. Rama Rao*, 17 Mad. 973. A man can be said to have an interest in the estate, if the applicant for re- he has a right to, and is willing himself to take a grant vocation must have in- in substitution, *Parman v. Nekram*, 87 All., 880 : 29 I.C. terest in the estate, and 183 (*supra*); *Gany v. Omar*, 13 Pun. L.T. 111 : 61 I.O. 568. must not claim adver- Any interest however slight, and even the bare possibility sely to the testator.

of an interest is sufficient to entitle a person to oppose a grant or to ask for revocation, *Kipping v. Ash*, 1 Reb., 270, cited in 17 Mad. 373 : *Nalin Chandra Guha v. Nibaran Ch. Biswas*, 59 Cal. 1808 = 36 C.W.N. 635 = A.I.R. 1932 Cal. 734 = 140 I.C. 54. Cf. *Crispin v. Doglione*, 2 Sw. & Tr. 17 ; *Mt. Sheopati v. Rama Kant*, 25 Pat. 747 = A.I.R. 1947 Pat. 494. Even a mere reversionary interest entitles a person to intervene in the probate proceeding, *Priyanath Bhattacharji v. Sailalala Devi*, A.I.R. 1929 Pat. 385. It is not necessary that the person should have an interest in the estate at the time of the testator's death. Interest acquired after the testator's death would do, *Gopesh Chandra v. Sylhet Loan Co.*, 41 C.W.N. 120. The interest should be claimed through the deceased and not independently of, or adversely to, him, *Alhiram Das v. Gopal Das*, 17 Cal. 48 ; or in other words, the applicant for revocation must claim to have "an interest in the estate of the deceased" within the meaning of sec. 283 (1)(c), *post*; *Srigolind Pershad v. Laljhari*, 14 C.W.N. 119 ; 2 I.C. 40 ; *Phirojshah v. Peitonji*, 34 Bom. 459. For the meaning of the expression, "interest in the estate of deceased", occurring in sec. 283 (1) (c), read *Mulukdhari v. Prem Debi*, A.I.R. 1959 Pat. 570 — relying on A.I.R. 1929 Pat. 385 ; A.I.R. 1930 Pat. 488. If a person disputes the title of the testator and claims title in himself adversely to the testator, he will not be considered to be a person interested in the deceased's estate, *Komalangi Ammal v. Sowbhagi Ammal*, 64 Mad. 24 = 59 M.L.J. 529 = 1930 M.W.N. 965 = A.I.R. 1931 Mad. 37 = 128 I.C. 476. Or, in other words, a person disclaiming interest in the deceased's estate, or repudiating the testator's power of, and position over, the property is not one who can claim *locus standi* herounder, *Mohant Ram Das v. Prem Das*, 10 Pat. 617 = A.I.R. 1932 Pat. 95 = 136 I.C. 296 ; *Janks Saran v. Ram Bhadur Sahi*, A.I.R. 1932 Pat. 343 = 140 I.C. 722 [person claiming title paramount has no *locus standi*]. For this reason the spiritual descendant of a *mohant* testator, alleging that the properties disposed of by the deceased *mohant* belonged to him in his official and not personal capacity and as such could not be disposed of by him, is not entitled to apply for the revocation of the *mohant*'s will, *Mohant Ram Das v. Prem Das*, 10 Pat. 617 = A.I.R. 1932 Pat. 95 = 136 I.C. 296. Where the ground of opposition was that the will purported to dispose of the *stridhan* jewel of the caveatrix, the objector loses his *locus standi*, *Sowbagiammal v. Kumalangiammal*, 64 M.L.J. 362 = A.I.R. 1928 Mad. 803 = 107 I.C. 420. Cf. *Baistab Charan v. Ganga Sagar*, 1 C.L.J. 258. If a man's right to a share in the estate is declared to be barred in an administration suit, he cannot be said to have an interest which will support his claim for revocation, *Abdul Rahman v. Maung Min*, 12 Bur. L.T. 114 : 51 I.C. 355.

Who have *Locus Standi* :— A person interested in the estate of the deceased by virtue of an assignment has a *locus standi* to contest that the interest by assignment will is a forgery and to pray for revocation, *Digambar v. Narayana*, 18 Bom. L.R. 98 : 9 I.C. 354. Thus, a purchaser from a widow of the deceased testator is entitled to contest in a revocation proceeding, *Komallchun v. Nilruttun*, 4 Cal. 860 ; *Lalit Mohan v. Navadip*, 28 Cal., 567 ; *Shek Azim v.*

Chandranath, 8 C.W.N. 748. Likewise, it has been laid down that a person interested by assignment in the estate of the deceased may if the will set up be at variance with his interests, apply for revocation of the probate of the will. He need not show that he had an interest in the estate *at the time of the testator's death*. An interest acquired subsequently by purchase of a part of the estate is sufficient. *Mokhadayini v. Karnadhar*, 19 C.W.N. 1108 : 81 I.C. 702. *Vide also Muddun Mohan v. Kalicharan*, 20 Cal. 87.

An attaching creditor of the heir-at-law can apply for revocation. *Nilmoney v. Umanath*, 10 I.A. 80 : 10 Cal., 19 : *Kishen Dai v. Satyendra*, 28 Cal. 441; *Dinabandhu Roy v. Sarala Sundari*, *infra*. So can the mortgagee of the estate, *Kashi v. Gopikrishna*, 19 Cal., 48; *vide also* the cases, *Ma Ne v. On Huit*, 7 L.B.R. 93 : 22 I.C. 925; *Akhoy Kumar v. Prosonno Kumati*, 80 I.C. 588; *Surbamongola v. Sashi*, 10 Cal. 413. A creditor of the estate who alleges that the will has been set up for defrauding the creditors has a *locus standi* to contest the will and to apply for revocation, *Lakhi Narain v. Mulcand*, 16 C.W.N. 1099 : 17 C.L.J. 250 : 16 I.C. 686. Cf. *Baijnath v. Desputty*, 2 Cal., 208; *Arakal v. Narayan*, 34 Mad. 405. The creditor of an heir-at-law, threatened to be deprived by a will, can apply for revocation hereunder, *Sarala Sundari Dassya v. Dinalandhu Roy*, 71 I.A. 1 = 48 C.W.N. 273 = (1944) 1 M.L.J. 247 = 1944 A.L.J. 124 = A.I.R. 1944 P.C. 11 = 212 I.C. 1 (P.C.). Likewise, an auction-purchaser of the interest of the heir-at-law is entitled to oppose the grant and ask for revocation; it is immaterial that he had no interest at the time of the testator's death. *Nabin Chandra Guha v. Nibaran Ch. Guha*, 69 Cal. 1808 = 36 C.W.N. 635 = A.I.R. 1932 Cal., 734 = 140 I.C. 54. The fact that the creditor is an ordinary one, and not an attaching creditor makes no difference. *Dinabandhu Roy v. Sarala Sundari*, I.L.R. (1940) 1 Cal. 33 = 71 C.L.J. 25 = 44 C.W.N. 149 = A.I.R. 1940 Cal. 296 = 188 I.C. 787 [case of creditor of heir-at-law].

For the interest of a widow during the life time of her sons, see *Brinda v. Rathiika*, 11 Cal., 492; *Re Amritalal*, 27 Cal. 350. An heir-at-law, if not cited, can call upon the executor to prove the will in solemn form in his presence.

Reversioners. *Ellokeshi v. Hari prosad*, 7 C.W.N. 460; Cf. *Rebells v. Rebells*, 2, C.W.N. 100. For the reversioners' right, see *Gopimohun Eysack*, 5 O.L.J. 560. In *Bipin Behari v. Manoda Dasi*, the sister's son (who was a reversioner entitled to come after the deceased's widow) was held entitled to apply for revocation. Reversioners who but for the will would have been entitled to the estate are entitled to special citation. *Akhileswore v. Haricharan*, 40 O.L.J. 297 : A.I.R. 1925 Cal., 223 : 84 I.C. 689; *vide also* *Haritaran v. Basanta Kumar*, 6 I.C. 164 (Cal.); *Brindaban v. Sureswar*, 10 O.L.J. 268 : 8 I.C. 178; *Shamlal v. Bameswar*, 23 C.L.J. 82 : 87 I.C. 278; *Shyama Charan v. Prfulla Sundari*, 21 O.L.J. 557 : 19 C.W.N. 882; *Satindra Mohan v. Saroda*, 27 C.L.J. 820 : 45 I.C. 59; *Annada Charan v. Atul*, 23 C.W.N. 1045 : 54 I.C. 197. Where a daughter, who is the immediate reversioner, is barred by her conduct from applying for

revocation, an application for revocation can be made by her sons, who are remoter reversioners. *Haridas v. Bidhumukhi*, 85 C.L.J. 66 : A.I.R. 1922 Cal., 88 : 68 I.C. 795. Where a grant was made in favour of the testator's widow on the withdrawal of opposition by the testator's brother, it would be open to the son of that brother to apply for revocation on the ground that no notice of the proceedings was served on him. *Shama Charan De v. Reebala Dassi*, 80 C.W.N. 567 = A.I.R. 1926 Cal., 792 = 96 I.C. 682. For the *locus standi* of an heir with respect to *stridhan* property, see *Sashibhusan v. Rajendra*, 40 Cal., 82. A legatee under a will which is superseded by a later will is entitled to apply for revocation, of the probate of the later will, inasmuch as his interest is at stake. *Darupadi Da:ya v. Rajkumari*, 22 C.W.N. 564 : 45 I.C. 760. As to the right of a childless married daughter about to be mother of an adopted son for making an application hereunder, read *Re the goods of Atul Krishna*, 91 C.L.J. 224 — ref. to I.L.R. (1942) 1 Cal., 299. A minor daughter of the testator is entitled to citation as contemplated in Ill. (ii) hereof and her non-citation makes the proceeding defective in substance, *Mt. Shecpati v. Rama Kanta*, 25 Pat. 747 = A.I.R. 1947 Pat. 434.

Instances of persons having no locus standi:—The following persons have no *locus standi*: (a) persons claiming no interest in the deceased's estate or claiming adversely to the deceased, 17 Cal., 48 ; 14 C.W.N. 119 ; 2 I.C. 40 ; 34 Bom. 469 ; 1 C.L.J. 258 ; 54 Mad. 24, all cited at p. 491, *ante*; read also the cases noted under Cl. (e) of sec 283 under the caption "Persons claiming to have interest"; (b) relations tie with whom is severed by degradation of a woman, see *Re Kamineymoney Bewa*, 91 Cal., 677 ; *Sarnamoyi v. Secretary of State*, 26 Cal., 254 : 2 C.W.N. 97 ; *Bhutnath v. Secretary, of State*, 10 C.W.N. 1086 ; but see *Subharam v. Ramasami*, 28 Mad., 171 ; *Naragin Das v. Tirlok*, 29 All., 4 ; (c) the widow of a predeceased son, *Re Gobinda Babaji*, 17 C.W.N. 1141. Cf. 19 C.W.N. 1169 ; (d) a reversionary heir claiming independently of the will, 1 C.L.J. 258 (*supra*) ; Cf. *Gopal v. Ashutosh*, 20 I.C. 342 ; (e) the illegitimate son of a Sudra, who though entitled to maintenance, has no interest in his father's estate, *Re Sarat Chandra Patra*, 2 C.W.N. colvi (266) ; (f) the creditors of persons who are not heirs at-law, *Nilmoney Singh v. Umanath*, 10 Cal. 19, P.O., *supra* ; (g) a legatee whose interest is not affected, Cf. 17 Mad. 878 ; vide also the cases cited at pp. 490-91, *ante* ; (h) aliens since the probate are not necessary parties to proceedings for revocation of the grant of probate on the ground of proceedings being defective in substance. But if after revocation the propounder is called upon to prove the will in solemn form, such aliens may intervene to present opposition to the grant, *Haimabati Mitra v. Kunja Mehan Das*, 85 C.W.N. 387 = A.I.R. 1931 Cal., 713 = 185 I.C. 282.

Objection as to locus standi:—The objection as to the applicant for revocation having no *locus standi* should be taken at an early stage and before the trial Court has functioned in the matter and not before the appellate Court for the first time, *Bulaki Mal v. Shambunath*, 6 Lah., 180 ; *Mayho v. Williams*, 2 N.W.P. H.C.B.

For appeal from the order deciding the question of *locus standi*, vide under the heading "Appeal" below.

Acquiescence and Delay operate as a bar to Revocation :— Where the petitioner for revocation comes to Court after considerable delay, and knowledge of, and acquiescence in, the grant of probate on his part are shown, the Court will not allow him to re-open the probate, unless he offers some reasonable and true explanation of the delay. *Monorama v. Shiva Sundari*, 42 Cal. 480 : 19 C.W.N. 866; *Radhashyam v. Ranga Sundari*, 24 C.W.N. 541 : 59 I.C. 864; *Kunja Lal v. Kaslas*, 14 C.W.N. 1068; *Hemlata v. Radharaman*, 51 I.C. 561 (Cal.); *Merryweather v. Turner*, 3 Curt. 802 (819); *Kalidas v. Ishan Chunder*, 81 Cal., 914 : 9 C.W.N. 42. The applicant for revocation of probate may be barred by acquiescence and delay for a long time or by subsequent ratification of the disposition of the will, from putting the executor to the proof of the will in solemn form or from contesting its genuineness. *Nalini Sundari v. Bejoy Kumar*, 21 O.L.J. 555 ; 11 I.C. 277; *Profulla-nanda v. Brojendra*, 51 I.C. 593 (Cal.); Cf. *Shyam Lal v. Rame:wari*, 23 C.L.J. 82; *Mohan v. Broughton*, 1900 P. 56. Great delay may be, (but not necessarily is) fatal although not amounting to acquiescence, *Haimabati Mira v. Kunja Mohan Das*, 35 C.W.N. 387 = A.I.R. 1931 Cal. 713 - 185 I.C. 282 [Probate dated 1845 was revoked in 1927]; Mere delay may not count when it does not lead to any inference of acquiescence or waiver, *Aswini Kumar Chakravarthi v. Sukharan Chakravarthi*, 35 C.W.N. 568 = A.I.R. 1931 Cal. 717 - 185 I.C. 266; *Re goods of Atul Krishna*, 91 C.L.J. 224. Read also 1955 S.C.J. 578; A.I.R. 1947 Pat. 434; A.I.R. 1959 Pat. 570. Where a person admits the genuineness of a will and allows it to be probated, and acts upon it, he cannot subsequently challenge it as forged, *Bacha Kumar v. Babui Suraj*, 171 O. 763 (Cal.); Cf. *Haridas v. Bidhumukhi*, 35 O.L.J. 36. The petitioner is not barred by lapse of time, if he can show good reason, *Hoffman v. White*, (1805), 2 Phills 260n; *Monorama v. Scshimohan*, 42 Cal., 480 : 19 C.W.N. 866 : 28 I.C. 886. A person is not barred of his remedy on the ground of waiver, unless at the time of the alleged waiver he is shown to have been fully cognisant of his right and of the facts of the case, *Shyama Charan v. Prafulla Sundari*, 21 C.L.J. 557 ; 19 C.W.N. 882, referring to *Darnley v. L. C. & D. Ry Co.*, (1869) L.R. 2 H.L. 43 (60).

If the immediate reversioner is barred by acquiescence, waiver &c from applying for revocation, that will not debar a remoter reversioner from applying for such revocation. *Haridas v. Bidhumukhi*, 35 O.L.J. 66 : A.I.R. 1922 Cal. 88 : 68 I.C. 795. Cf. *Brindaban v. Sureswar*, 10 C.L.J. 263 : 5 I.C. 178.

Knowledge of probate proceedings bars Revocation :— A party cognisant of a proceeding for probate or letters of administration, but standing by, is concluded by the result of such proceeding, *Forbes v. Peterson*, 1.L.R. (1941) 2 Cal. 1 = 45 C.W.N. 739 = A.I.R. 1941 Cal., 417 - 196 I.C. 111; also A.I.R. 1942 Cal. 288 = 201 I.C. 545;

vide notes under the heading, *Res judicata*, at p. 489, *ante*, and read 46 M.L.J. 383. Cf. *Re Bhuggobutty Dasi*, 27 Cal. 927 : 4 C.W.N. 757. As to to what cases this principle does or does not apply, *vide*, *Shyama Charan v. Prafulla Sundari*, 21 C.L.J. 557 : 19 C.W.N. 892. If a party being aware of the proceeding stands by and allows it to be concluded in his absence, he cannot be allowed afterwards to come in to have the grant revoked, *Sheo Gopal v. Sheo Ghulam*, 14 O.C. 77 : 10 I.C. 717; *Re Bhobosundari Dabee*, 6 Cal. 460; *Brinda v. Radhika*, 11 Cal. 492; *Nistarini v. Brahmamoyi*, 18 Cal. 45; *Re Pitambar Girdhar*, 5 Bom. 688. Cf. *Wytcherly v. Andrews*, L.R. 2 P. & D. 327; *Young v. Holloway*, 1896 P. 87; *Newell v. Weeks*, (1814) 2 Phillim, 224 [N. B. The law in India in this respect is virtually the same as in England]; *Sarada v. Gobind*, 12 C.L.J. 91. A person aware of the fact that a probate has been granted in solemn form is not entitled to require the will to be proved afresh in his presence on the ground that he was entitled to special citation and that citation was not served on him, *Sadafal Kanu v. Gadari Hajam*, 35 C.W.N. 58-A I.R. 1891 Cal. 497-131 I.C. 856. As to how far this rule may possibly become complicated by the existence of a minor or pardanashin beneficiary, *vide Forbes v. Peterson, supra*. The principle of the above rule will not apply where notice of the proceeding is given to the minor himself without getting him represented by a guardian *ad litem*, *Dwijendranath v. Goloknath*, 19 C.W.N. 747 ; 21 C.L.J. 287 : 28 I.C. 574. But if however the minor accepts benefit under the will, he will be bound by estoppel, *Radhashyam v. Ranga Sundari*, 24 C.W.N. 641 : 59 I.C. 664. Opportunity should always be given of proving ignorance of the previous proceeding, *Dintarini v. Dosbochandha*, 8 Cal. 660; and the onus is always on the propounder to show that the objector was already aware of the proceedings, *Sadafal Kanu v. Gadari Hajam, supra*.

Just Cause:—For meaning of the expression, see *Harcowmar v. Doorgamoni*, 21 Cal. 195. The executor's unfitness or incompetency is no just cause for removing him, *Ibid*; similarly, ex-communication of the executor from the community on account of his immorality is no just cause for his removal, *Mohundas v. Luchmandas*, 6 Cal. 11. Likewise his mismanagement, mal-administration etc. of the estate are no *just causes*, *vide* the cases cited under the heading "Revocation," *supra*. Omission to furnish further security is a *just cause*, *Surendranath v. Amritalal*, 47 Cal. 115. But see *Parbati v. Premshukh*, 7 Lah. L.J. 89 : 86 I.C. 668. Omission to cite a proper party is a *just cause*, *vide* under "non-citation, a ground for revocation" at pp. 486-87, *ante*. No grant shall be revoked merely by reason that the testator or intestate had no fixed place of abode or property within the district at the time of his death, sec. 275, post Cf. 2 C.W.N. 660; *Re Rose Anne D'Silva*, 25 All. 365. Where a grant is made by consent in common form, non-compliance with the conditions on which consent was given is not a *just cause*, *Nicol v. Askew*, 2 Mo. P.C.C. 88. Cf. *Re Hislop*, 1 Rob. 467. Where such consent is obtained by fraud, it may furnish a *just cause*, *Kalyani Dasi v. Mukunda*, 3 C.L.J. 37(n). For other cases of "*just cause*", *vide* notes to the Explanations, *infra*.

Cf also *Re Mooney*, L.R. Ir. 8 Ch. D. 281 and *Southern Bank Ltd. v. Kesardeo Ganeriwalla*, 62 C.W.N. 444 = A.I.R. 1958 Cal. 377.

The Explanations:—The explanations of the expression "just cause" given in the section are exhaustive and not merely illustrative, *Annada Prasad v. Kali Krishna*, 24 Cal. 95 [followed in *Southern Bank Ltd. v. Kesardeo*, 62 C.W.N. 444 = A.I.R. 1958 Cal. 377]; *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom., 792(798); *Surendra v. Amritalal*, 29 C.L.J. 496 (501); *Gulam Ali v. Rahmatulla*, 1941 Rang. L.R. 376 = A.I.R. 1941 Rang. 259 = 198 I.C. 243; *Prem sukh v. Parbati*, 7 Lah. 270 = 27 P.L.R. 384 = A.I.R. 1926 Lab. 352 = 94 I.C. 329; *Re T. A. Mudaliar*, A.I.R. 1958 Mad. 622.

Expl. (a): Defective in Substance:—Mere absence of notice is not "just cause" for holding that the probate proceedings were defective in substance, *Mangala Gouri v. Samson Shalom*, 51 I.C. 24 (Nag.); vide the notes under the heading, "Non citation, if a ground for revocation" at pp. 486-87, ante. Grant of administration without citing the executor appointed by the will is defective in substance, *Hormusji v. Dhunbaiji*, 12 Bom., 164. Cf, *Akhileswari v. Harisharan*, 40 C.L.J. 297 : A.I.R. 1925 Cal. 223 : 84 I.C. 689. Where a statement as to the relations of the deceased is wrongly made and misleads the Court in directing the proper issue of special citation the proceeding to obtain the grant is defective in substance, *Shyama Charan v. Profulla Sundari*, 19 C.W.N. 882 : 21 C.L.J. 557 : 80 I.C. 161. Where before grant of probate some kind of formality was gone through on the occasion when service of notice was said to have been effected, but it was not such as would give to the person alleged to have been served an opportunity to contest the grant or to require the will to be proved in her presence, the proceedings would be defective in substance, *Ramanandi Kuer v. Kalawati Kuer*, 55 I.A. 18 = 7 Pat. 221 = 47 C.L.J. 171 = 32 C.W.N. 402 = 30 Bom. L.R. 227 = (1928) M.W.N. 282 = 54 M.L.J. 281 = 26 A.L.J. 385 = A.I.R. 1928 P.C. 2 = 107 I.C. 14, (P.C.). Where no schedule in the prescribed form is attached to an application for grant of probate or letters of administration, the proceedings to obtain the grant will be defective in substance within the meaning of his clause, *Khub Chand v. Motil Bai*, 30 S.L.R. 201 = A.I.R. 1036 Sind 150 = 165 I.C. 202. As to what consideration the Court will have to make when an application for revocation is made on the ground that the proceedings were defective in substance, vide *Pusupati Sadhukhan v. Janaki Nath*, 74 C.L.J. 389 = A.I.R. 1942 Cal. 236 = 200 I.C. 588. Where citation has been ordered but not issued, the onus is on the executor to show that there was no defect of substance in the proceeding, *Eussoof Ahmed v. Ismail Ahmed*, 1938 Rang. 320 = A.I.R. 1938 Rang. 261 = 176 I.C. 614 (F.B.).

Where an applicant for probate issued a citation to himself as a guardian of a minor party, the proceeding was defective in substance, *Sharosibala Debi v. Annadamayi*, 12 C.W.N. 6.

The Court may refuse to grant annulment in cases where there is no likelihood of proof being offered that the will admitted to probate was either not genuine or had not been validly executed, *Anil Behari Ghose v. Lalita Bala*, 1965 S.C.A. 1026—1955 S.C.J. 578—A.I.R. 1955 S.C. 666—(1955) 2 M.L.J. (S.C.) 84.

Expl. (b): Fraud and False Suggestion:—Fraud vitiates a grant, see *Kamal Lochan v. Nilruttan*, 4 Cal. 860; *Debendranath v. Administrator-General*, 86 Cal. 955 (P.U.). Of *Ellis v. Ellis*, (1905) 1 Ch. 619: False suggestion or misleading statement and concealment of a material fact are closely allied. For instance, where the applicant obtains a grant concealing the existence of a near relation or making a false suggestion that no near relation exists, in consequence of which the Court does not issue a special citation on such relation; Cf. *Shyamacharan v. Prafulla*, 21 C.L.J. 557: 19 C.W.N. 882; also at pp. 486-87, ante. Also 19 C.W.N. 1108: 81 I.C. 701. As to whether this clause will cover the case of grant obtained by non-disclosure of sale of property by heir-at-law, see 60 C.W.N. 423 (this view does not seem to be correct). As to how far the allegation of the will being a camouflage to defraud creditor is a *just cause*, see *Southern Bank Ltd. v. Kesardeo*, 62 C.W.N. 444—A.I.R. 1968 Cal. 377.

Expl. (c): Untrue Allegation:—This explanation differs from the Expl. (b) in the main fact that the latter contemplates a *fraudulent* or *dishonest* motive; but under this Explanation, though the act is practically of the same description, still it is not characterised by the same positive dishonest motive. Therefore, a misleading statement, even if *bona fide* made be a ground of revocation, if it is *essential in point of law* to justify the grant, *Hawson v. Shelley*, (1918) 2 Ch. 854. A misstatement of the date of death is no just cause for revocation as the statement is not very material to the case, (*vide* the forms in Schedules vi and vii; but see Sec. 261); *Muna Abu v. Bee bee*, 4 Bur. L.J. 78; For misstatement as to residence, see 6 C.W.N. 377. An allegation that the applicant for grant is an executor, which is not correct, comes within the mischievous effect of this clause, *Sardar Singh v. Swami Chakrapani*, I.L.R. (1946) All. 398—A.I.R. 1946 All. 957—226 I.C. 684. Suppression of revocation of the will itself by the testator himself may come under this Explanation, *vide* Illustration iii; also *Anil Behari Ghose's case*, 1955 S.C.A. 1026—*&c.*, *supra*. Discovery of a subsequent will, will not be a *just cause*, if the objector to the grant knew of that will and suppressed it at the time of the grant, *Pradip K. Sarkar v. Umarani Bose*, A.I.R. 1969 Cal. 277.

Expl. (d): Useless and inoperative, &c.:—This *Explanation* means that since the grant such new circumstances have been brought to light that the grant cannot any longer be upheld; *Gour Chandra v. Sarat Chandra*, 40 Cal. 50: 16 C.W.N. 880: 16 I.C. 44. Such circumstances might have existed at the date of the grant though they were not known at the time, and had they been known at that time,

the grant would not have been made at all. Again, such circumstances may be such as might have happened since the date of the grant; *Surendranath v. Amritalal*, 47 Cal. 115; 29 O.L.J. 496 (501); 29 C.W.N. 763; 57 I.C. 936. Instances of circumstances existing at the date of the will but subsequently discovered are such as the discovery of a codicil, or of the fact that the will is a forgery. Cf. 40 Cal. 50, *supra*; also *Anil Behari Ghose's case*, 1955 S.O.A. 1026 = &c., *supra*. Instances of subsequent happening of circumstances are, (1) conviction and imprisonment of the grantee, *Re Patterson*, 2 C.W.N. 600 (309); (2) disappearance of the grantee after grant, *Re Sowerby* (1891) 65 L.T. 764; *Re Shaw*, 1905 P. 92; *Re Phillips*, 2 Add. 935; *Re Newton*, 8 Curt 428; (3) Lunacy of the grantee, *Re Jenkins*, (1819) 3 Phil. Ecc. 88; *vide* the other cases cited at p. 502 of 29 O.L.J.; (4) Default in furnishing additional security called upon by the Court, *Surendranath v. Amritalal*, *supra*; (5) Recusancy on the part of the grantee to administer the estate, *Ram Pershad v. Sardha Ram*, A.I.R. 1985 Lah. 968 = 158 I.C. 374. A grant may turn out useless from many circumstances: Thus, where a grant was obtained in one province, and an Insurance Company in another province refused to pay on the strength of such grant, the grant becomes *useless* and should be annulled under this explanation to enable the obtaining of a fresh grant in the other province, *Re Elizabeth De Souza*, 1 S.L.R. 177. Cf. *Saroda v. Triguna*, 8 Pat. L.J. 416; *Re Courjan*, 25 Cal. 65; *Re Adamson*, 3 P. & D. 263. A grant does not become *useless and inoperative*, simply because the administrator has no further work beyond distributing legacies. If the administrator wilfully withholds payment of the legacies, it would be a case of mal administration, which is not covered by the idea that the grant has become *useless and inoperative*. The grant may become *useless or inoperative* when incapability, infeasibility of administration results from circumstances so much so that the position becomes as if one of non-administration, which is quite different from mal-administration, *Srish Chandra Chowdhury v. Bhabatarini Debi*, 48 C.L.J. 262 = 32 C.W.N. 993 = A.I.R. 1928 Cal. 696 = 114 I.C. 794. The clause does not apply to cases where administration has been completed, *Nani Lal Das, In re*, I.L.R. (1939) 2 Cal. 1 = A.I.R. 1930 Cal. 787.

Expl. (e): Exhibit an Inventory or Account:—Mere omission to submit accounts is not a "just cause" within the meaning of this section. Cf. *Bal Gangudhar v. Sakwarbai*, 26 Bom. 792; but if such omission is wilful and without any justification whatsoever then it may furnish a ground for revocation, *Premchand v. Surendranath*, 9 C.W.N. 190; *Gokul Das v. Purshottam*, 4 Bom. L.R. 978. Likewise, the mere fact that the inventory is required to be filed is not a sufficient cause, unless it can be shown that the inventory was withheld wilfully and unreasonably, *Hem'ata Debi v. Radharaman*, 51 I.C. 561 (Cal.). As to when and under what circumstances omission to exhibit accounts will be regarded as wilful and without reasonable cause, see *Anil Behari Ghose's case* 1955 S.O.A. 1026 = &c., cited *supra*; read also *Re T. A. Mudaliar* A.I.R. 1955 Mad. 622. The Act contemplates submission of one inventory and one account. The

Inventory should be filed within 6 months, and the account within one year, of the grant, unless such periods are enlarged by the Court, and should set forth the particulars mentioned in sec. 317, *post*. If the inventory or the account is untrue in material respects, that may be a ground for revocation, though mere omission to file them is not, *Chandra Kumar v. Prasanna*, 48 Cal., 1051; 88 C.L.J. 451 (455); 25 C.W.N. 977 : 64 I.O. 997; *Promothanath Dutt v. Gourdas Muhato*, 66 C.L.J. 386—A.I.R. 1938 Cal. 294—174 I.C. 951. Cf. *Mohesh Chandra v. Biswanath*, 26 Cal. 250; *Maddali v. Subbarayudu*, 34 I.O. 485. A vague allegation that the account is inaccurate will not do: but there must be specific allegations in what particulars it is inaccurate, *Chandra Kumar's case, supra*. The Court in its discretion should not grant revocation where it is not possible to furnish an accurate inventory in the peculiar circumstances of a case, *Maddali Venkataswamy v. Vellampalli*, 34 I.O. 495 (Mad.).

Illustrations to the Section:—What are just clauses within the meaning of the section, have been illustrated by eight examples. Illustrations are considered to be part of the statute, *Lal Bala v. Ahad Shah*, 29 C.L.J.-165—23 C.W.N. 288—36 M.L.J. 614—48 I.C. 1 (P.O.), but they cannot override the plain meaning of the terms of the section, *Koylash v. Sanatan*, 7 Cal. 132 (195); read the observations of Lord Shaw in *Mahomed Sycdol v. Yehool Gark*, (1916) 2 A.C. 575—48 I.A. 256—21 C.W.N. 257—39 I.O. 401 (P.U.). Illustration (i) shows that a grant made without jurisdiction is liable to be revoked, apparently on the ground that the proceeding was defective in substance. According to some opinion, a grant made without jurisdiction is void *ab initio* and a nullity, and does not stand in need of any annulment, read the notes at p. 488. Under Illustration (ii), omission to cite parties who ought to have been cited is a ground for revocation. It may be said that if the presence of any party in a proceeding under the Act has been required by any of its sections, then that party ought to be cited. The words, "the family and other relatives of the deceased" occur in sec 278 but not in sec 276. So, it would seem that an applicant for probate can afford to ignore them without being involved in the risk of revocation, but the Calcutta Court has held otherwise, *Charubala De v. Menaka Sundari*, 86 C.W.N. 1010. This risk of revocation will not have the effect of invalidating the grant of probate by itself or before actual revocation under this section. Cf. *Southern Bank Ltd. v. Kesared*, 62 C.W.N. 444—A.I.R. 1968 Cal. 377.

Limitation:—The Limitation Act is not applicable to an application for revocation, *Re Ishan Ch. Roy*, 6 Cal., 707 : 8 C.L.R. 52. Cf. *Merryweather v. Turner*, 3 Court. 802. A person to whom no citation was issued can come even after a lapse of 88 years to contest the will as forged, he will not be time-barred, *Shyamal v. Rameshwari*, 28 C.L.J. 82 : 88 I.O. 278, of course, if not barred by estoppel, acquiescence, waiver, etc., for which see at p. 494, or by *res judicata*, 46 M.L.J. 389, *supra*.

Review:—As to whether a *review* is allowable for the purpose of revocation, see *Re Pitambar Girdhar*, 5 Bom., 698. For the exercise of inherent powers under sec. 151, see *Parman v. Nek Ram*, 37 All. 380. Cf. 38 All. 383. A grant can be revoked not only under this section but also by way of review in contested proceedings, *Kyone Hos v. Kyon Soon*, 3 Rang. 261. Cf. *Parman v. Nekram*, 37 All. 380 : 18 A.L.J. 44 ; 29 I.C. 198.

Jurisdiction:—Subordinate Judges invested with authority under High Court notification (e.g. Notification No. 8986-A, dated the 25th June, 1827), will have power to entertain application hereunder (which *ex hypothesis* are contested matters), *Narendra Nath v. Fakirmani*, A.I.R. 1952 Cal. 20.

Appeal:—An order of the District Judge holding that a certain party has a *locus standi* to contest a will is an interlocutory order and not appealable, *Likhinaraia v. Multan Chand*, 17 C.L.J. 280 : 16 C.W.N. 1099 : 15 I.C. 646; *Sri Proshad v. Dulhin Genda*, 18 C.L.J. 612. *Comp. Abhiram Das v. Gopal Das*, 17 C.L.J. 48 (61); *Kheltermani Dasi v. Shyama Charan Kundu*, 21 Cal. 539; *Lalit Mohan Das v. Radharaman Saha*, 16 C.W.N. 1021. Cf. A.I.R. 1953 T.C. 122. Vide also notes under sec. 299, *post*. There is, however, an appeal if the Court decides that a party has no *locus standi*, because this is tantamount to a dismissal of the objection petition and is tantamount to a decree, *Lakhi Narain v. Multan Chand*, *supra*. There will be no appeal on merit on the ground of non-citation if in the revocation proceeding started by the non-cited person, the will is found to be genuine, *Lal Govind v. Shri Ram*, I.L.R. (1947) All. 209 = 1947 All. L.J. 82 = A.I.R. 1947 All. 872.

Valuation in appeal:—The value for purposes of jurisdiction of an application to revoke the probate extends to the whole property covered by the probate and is not limited to the interest of the applicant therein. So, an appeal from the order of a Sub-Judge on such an application, where the property covered by the will is worth more than Rs. 8000/- lies direct to the High Court and not to the District Court, even though the applicant's share is worth only Rs. 1600/-, *Ramgopal v. Jatunbai*, 57 Bom. 143 = 34 Bom. L.R. 1677 = A.I.R. 1938 Bom. 71 = 141 I.C. 575.

CHAPTER IV.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

264. [Pro. S. 51 & Suc. S. 235] (1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

Jurisdiction of District Judge in granting and revoking probates, etc.

(2) [Pro. S. 2] Except in cases to which section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay, *** shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the official Gazette, authorised it so to do.

N. B.—"The proviso incorporates the provision of sec. 2 of the Act of 1881"—Notes on Clauses of the Original Bill.

Jurisdiction of District Judges:—The repealed Act of 1881 contained a definition of the term "District Judge," but that has been omitted from the present Act on the reason that the definition of it as given in sec. 8 (15) of the General Clauses Act is quite sufficient, *vide Notes on Clauses of the Original Bill*. Besides, to clarify the position further, in 1929, a definition of the term "District Judge," has been incorporated in sec. 2, *ante*. The definitions in the said sec. 2 apply throughout this Act, including the present section, unless a repugnant context makes the same inapplicable. Read the notes under sec. 2 (bb), at p. 9, *ante*. The District Judge has jurisdiction in the matter of making and revoking grants under this Act; but in the cases contemplated by sub-sec. (2) he will have no such power beyond the Presidency towns unless specially authorised by the State Government by a notification in the local official gazette in that behalf. By reason of the present sec. 2 (bb), added since 1929, the respective Original Sides of the High Courts of Calcutta, Madras and Bombay function as "District Judges" for the purposes of this Act. In Bengal also, sec. 57 applying, no such notification is necessary, but remember sec. 57 applies only in respect of wills made on or after the 1st September, 1870. Cf. *Luckmun v. Dukharan*, 6 C.L.R. 188. For the powers of District Judges in Probate matters, see *Re Krishna Kinker Roy*, 14 Oal., 37; *Krishna Kinker v. Pancharam*, 17 Oal. 272; *Rojnarayan v. Tulkumari*, 29 Oal., 68; *Kamanasundari v. Hurclat*, 8 Oal., 570. When an application for probate is refused by the District Judge, but allowed on appeal by the High Court, it is the duty of the District Judge to issue a grant, *Bayabai v. Saraswati*, 17 Bom., 666, and all subsequent proceedings should be before the District Judge. *Parvathi Pillai v. Velayudhan*, A.I.R. 1953 Trav. Co. 122. Cf. *Gobindlal v. Hemendra*, 17 Oal., 686. A revocation case is triable by the District Judge even where the original grant was made by a District Delegate (who should send the case to the District Court when the case becomes contentious). *Kailash Chandra Mondal v. Nanda Kumar*, 48 C.W.N. 751—A.I.R. 1944 Cal. 885—220 I.C. 875; *Mathoram Boro v. Msmt. Sundari Kacharani*, I.L.R. (1958) 5 Assam, 170—A.I.B. 1954 Assam, 64.

Court acts as one of conscience:—In entertaining an application for a grant under this Act, the Court really acts as one of conscience and if it finds that

the will is a genuine and valid document and has been executed, it will not refuse a grant simply because the propounders have been negligent, and grossly too, in the matter of resorting to the Court or in complying with the technical rules of law, *Vishnu Ram Krishna v Nathu Vethal*, 51 Bom L. R. 245 = A. I. R. 1949 Bom. 266.

Power of Transfer—by District Judge under Act XII of 1887 :—Under sec. 23 (2) (d) of the Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), the District Judge has power to transfer a contentious or non-contentious case to a subordinate judge for trial. Cf. *Kunjabshari Goswami v Hem Chandra Lahiri*, 25 Cal. 840; *Daho Kuer v. Tural Dei*, 8 Pat., 609 : 78 I.C. 701. An application for probate of the will of a deceased testator was made in the Court of the District Judge who transferred the case to that of the Subordinate Judge. The opposite party *inter alia* objected that the Subordinate Judge had no jurisdiction. Held, that the case came within the scope of section 23, sub-section 2, clause (d), of the Bengal North-Western Provinces and Assam Civil Court Act (XII of 1887), and therefore the Subordinate Judge had jurisdiction to try it, *Kunjabshari Goswami v. Hem Ch. Lahiri*, 25 Cal., 840. Where the business of a District Judge are assigned under the provisions of the various Civil Courts Acts to the Additional District Judges, all these latter judges become vested with powers co-extensive with those of the District Judge himself, sec. *Ganpal v. Mahadeo*, 4 D.L.R. (Nag.) 166 = 1949 N.L.J. 451 = A.I.R. 1949 Nag. 408.

Cases to which Section 57 applies :—That section applies to the wills of Hindus, Buddhists, Sikhs and Jainas etc., made on or after the 1st September, 1870 in the Lower Provinces of Bengal and in the towns of Madras and Bombay, *vide* notes at pp. 83-84, *ante*.

Assam :—In an old case, Assam having no Court of last resort was held not to have been a province within the meaning of sec. 2 (g), but was only a District for the purposes of this Act, *Thakoor Kristo v. Busoodeb Goshamee*, 12 W.R. 424. But the position has been altogether changed now. It is now a full-fledged State with a High Court, which however having no original jurisdiction will not have the benefit of sec. 2 (bb), *supra*.

Power of High Court :—The High Court has power to grant probate on the Original Side in any case which could have been brought before any District Judge, *vide* sec. 300, *infra*; also *Nagendrabala v. Kasipati*, 37 Cal., 224.

Limitation :—The Limitation Act does not apply to grants or to revocation thereof, *vide* notes at p. 499, *ante*; and at p. 510, *post*. Under the heading "Limitation," *Vide* also *Re Ishan Chandra*, 6 Cal. 707 : 8 C.L.R. 52; *Sailabala Das v. Baidya Nath Rakshit*, 82 C.W.N. 726 = A.I.R. 1928 Cal. 560 = 110 I.C. 542; *Durgapada*

Bera v. Atul Chandra, 41 C.W.N. 1204 = A.I.R. 1937 Cal. 595 ; *Manikbai v. Manikji*, 7 Bom. 213 : *Q. E. v. Ajudhia*, 10 All. 850 ; *Janaki v. Kesavalu*, 8 Mad. 207 ; *Thiruvengada v. Salia Sahib*, 9 M.L.J. 382 ; *Gobind Chand v. Ranjun*, 6 Caf. 60 : 6 C.L.R. 45 ; *Kashi Gopal v. Gopikrishna*, 19 Cal. 48 ; *Gananamthu v. Nadun*, 17th Mad., 379 ; *Zimali v. Wasudes Trimba*, 1947 N.L.J. 526 = A.I.R. 1949 Nag. 154 [No period of limitation for a probate application] ; *Shyamal v. Rameswari*, 23 C.L.J. 82 : 38 I.C. 273. No question of limitation arising, there is nothing to preclude an executor from asking for probate at any time. *Sailalata Dasi v. Baidyanath Rakshit*, 32 C.W.N. 729 = A.I.R. 1928 Cal. 680 = 110 I.C. 542, *supra*, but no probate can be granted until after the expiration of 7 clear days, and no administration until after the expiration of 14 clear days, from the testator's or intestate's death, see sec. 298, *infra*. Vide also *Re Wilson*, 1 Cal. 149.

Cases:—In *Chinnasami v. Hariharabhadra*, 16 Mad., 380 it was held that the question of the genuineness of the will was not *res judicata* for the purpose of the proceedings under the Probate and Administration Act though the will had been found to be a forgery in a previous proceeding under the Guardians and Wards Act. The District Courts have jurisdiction to entertain an application for the grant of probate or letters of administration in respect of wills of Hindu made before the 1st Sep. 1870. Section 187 (now s. 213) of the Succession Act not being made applicable to such wills, it is not obligatory on executors or legatees under them to take out probate or letters of administration in order to establish their rights in a Court of Justice. *Krishna Kinkar Roy v. Raj M. Roy*, 14 Cal. 87.

The order made by a District Judge on an application for probate, not being a final order, cannot be referred for the opinion of the High Court. But the Court will under certain circumstances, entertain such an application as a Court of concurrent jurisdiction under section 300, *post*. *In the matter of Monohar Mookerjee*, 5 Cal., 757. Where on an application to the District Court probate was refused on the ground that the will was not proved and on appeal the High Court found that the will was proved, held that the subsequent application for probate should be made to the District Court. *Bayabai v. Saraswati Bai*, 17 Bom. 686.

265. [Pro. S. 52 ; Suc. S. 235A & D.D.A.S. 2] (1) The High

Power to appoint Delegates of District Judge to deal with non contentious cases. Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe :

Provided that, in the case of High Courts not established by Royal Charter, such appointment shall not be without the previous sanction of the State Government.

(2) Persons so appointed shall be called "District Delegates".

The Section :— Compare the language of this section with that of section 264. The words "all cases" in sec. 264, make that section *widely* applicable, whereas this section is limited to the non-contentious cases only. So the District Delegates cannot have jurisdiction in contentious cases. Notice further that the power of revocation has not been contemplated by this section. So a District Delegate cannot entertain an application for revocation, *Mathoram Boro v. Memt. Sundari Kacharani*, I.L.R. (1958) 5 Assam. 170 = A.I.R. 1954 Assam. 64.

The Section Limited to Non-contentious Cases :— Where the caveators having by reason of a compromise withdrawn their opposition the District Judge sent the case to the District delegate for enquiry and report, held that the District Judge had acted within the powers conferred on him by this section, *Kunjala Chowdhury v. Kailash Ch. Chowdhury*, 14 Cal., 1068.

Non-contentious Cases :— *Vide* notes under sec. 272, *infra*; also under the next heading

Power of High Court :— The High Court has power to appoint District Delegates for the purpose of making grants under this Act, but the jurisdiction of such Delegates will be limited to non-contentious cases, *vide* 14 C.W.N. 1068 (*supra*); also *Francis v. Verghese*, I.L.R. 1957 Mad. 78 = (1966) 2 M.I.J. 288 = A.I.R. 1956 Mad. 680—following 9 All. 191; 11 Mad. 26. In case of non-chartered High Courts, the power is subject to the approval of State Governments. It should be noticed that the District Delegates *act for* the District Judge.

Local Government's power of repealing any part of the Act :— *Vide Laxmi v. Alia*, 82 Bom., 634.

Power of Additional District Judge :— An additional District Judge cannot grant probate unless he is appointed a District Delegate by the High Court, or exercise powers as a District Judge, *Ram Singh v. Murtibai*, A.I.R. 1923 Nag. 41: 68 I.C. 940. As to his power in Bengal, N.W.P. and Assam in a case received by assignment from the District Judge, see *Daho Kuer v. Tural Dei*, 3 Pat. 609: 78 I.C. 701; also under the heading "Power of Transfer" at p. 502, *ante*.

Subordinate Judge as District Delegate under Oudh Civil Rules, R. 239 :— Under R. 239 of the Oudh Civil Rules Subordinate Judges in Oudh, have been appointed District Delegates to grant probates and letters of administration in non-contentious cases only; *Ram Kishore v. Nand Kumar*, 11 O.W.N. 1801 = A.I.R. 1984 Oudh, 442 = 151 I.C. 843. Read the notes under the heading, "Power of District Delegate" under sec. 286, and the notes under the next heading.

Transfer of case to Subordinate Judge under Oudh Courts Act :— A transfer of case under sec. 81 of the Oudh Courts Act by a District Judge to a Subordinate Judge is made to the Subordinate Judge as such, and not to the District Delegate. Therefore, in such a case, the Subordinate Judge can deal with the matter even if contentious. *Kaloo v. Noor Jahan*, 10 Luck 816-11 O.W.N. 1481-A.I.R. 1885 Oudh, 98-152 I.C. 876. The position is different if the transfer is not under that section but is as to a District Delegate. In such a case, the Subordinate Judge will not be competent to deal with the matter, when it becomes contentious. *Anandpal Singh v. Ram Charan*, A.I.R. 1935 Oudh, 415-165 I.C. 601.

Notifications to invest Subordinate Judges :— It is quite possible to invest Subordinate Judges, by means of appropriate notifications, with power to hear contentious probate proceedings. Cf. *Ramasubbarayudu v. Bengammal*, I.L.R. (1962) Mad. 1001 = (1962) 2 Mad L.J. 818 - A.I.R. 1962 Mad. 450 (F B.)

266 [Pro. S. 53 & Suc. S. 236] The District Judge shall have the like powers and authority in relation to the powers as to grant of granting of probate and letters of administration, probate and administration and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.

Power of a Probate Court :— The Probate Court has all the powers of an ordinary Civil Court. It can appoint a Receiver in a testamentary suit. *Yeshwant Bhagwant v. Shankar Ram Chandra*, 17 Bom. 388. See also *Bayabai v. Saraswati Bai*, 17 Bom 686, *supra*. The rule of the Court of Chancery that a receiver will not be appointed against an executor unless gross misconduct was shown is not applicable to the case of an executor of the will of a Mahomedan; *Hafiza Bai v. Kazi Abdul Karim*, 19 Bom. 89. When an executor is not in possession of

forma pauperis, the property of the testator and cannot get possession of it and when he has not the means of paying the fees he may be allowed to petition in *forma pauperis*. *In the matter of Downbai Hazi Khan*, 18 Bom. 237. Cf. *Re Guru Charan*, 6 O.W.N. cxlvii. See also *Kunja v. Hem*, 25 Ca. 340. In *Arunmoyi Dasi v. Mohendranath Wadadar*, 20 Cal. 888 at p 895 it has been observed that a proceeding under the Probate and Administration Act is not a suit properly so called but takes the form of a suit according to the provisions of the C.P. Code. Section 299 allows an appeal to the High Court only in cases in which an appeal is allowable under the C.P. Code. No appeal therefore lies against an order refusing to make a person opposing probate a party defendant to an application for probate; *Keliramoni Dasi v. Syam Ch. Kundu*, 21 Cal. 539. In *Girindra Kumar Das Gupta v. Rajeswar Ray*, 27 Cal. 6, the Judicial Commissioner refused to correct a clerical mistake in a probate granted by his predecessor, held, no appeal lay, yet the High Court might interfere

with the case under section 115, C. P. Code, 1908. Section 25 of the English Probate Act (Statute 20 and 21 Vict. C. 77) has some resemblance to this section and it may be quoted here for the purpose of comparison which may help elucidation. That section runs thus : "The Court of Probate shall have the like powers, jurisdiction and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting or refusing to produce deeds, evidence or writings or refusing to appear or to be sworn or make affirmation or declaration, or to give evidence or guilty of contempt and generally for enforcing all orders, decrees and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be enquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court."

Power of Transfer :—*Vide* notes at p. 502, ante.

Power to grant Review :—*Vide* note at p. 500, ante.

Function of Probate Court :—The function of the Probate Court is to determine what documents are testamentary and who is the legal representative of the deceased. The Court has no power to go beyond the terms of the will and decide a question of title, which should be left for decision by another competent Court, *Sudhir Chandra v. Uttara Sunduri*, 37 O.W.N. 435—A.I.R. 1933 Cal. 571—145 I.C. 684. Read also *Sowbhagiammal v. Komalangi Ammal*, 64 M.L.J. 382—A.I.R. 1928 Mad. 803—107 I.O. 420; *Komalangi Ammal v. Sowbhagiammal*, 64 Mad. 24—59 M.L.J. 529—1930 M.W.N. 965—A.I.R. 1931 Mad. 37—128 I.O. 476, also the notes under sec. 245, under the heading, "Issue in a Probate Proceeding". It is not the business of the Probate Court to go into the question of the validity of the will or of any of its provisions, *Garib Shaw v. Patia Dassi*, 66 O.L.J. 337—A.I.R. 1888 Cal. 290—125 I.O. 920. A probate Court is not a Court of Probity, *Saw Yaw v. Saw Ba*, A.I.R. 1938 Bang. 251—177 I.O. 382. If the propounder has proved the will and there are no suspicious circumstances in connection with it, the Probate Court will grant the probate, *Ibid.* The Court should grant a probate after being satisfied on evidence of due execution of the will and not on a mere question of probability, *Garib Shaw v. Patia Dassi*, supra. It is not the function of a probate Court to construe a will, *Nand Kishore Lal v. Pasupati Nath Sahu*, 7 Pat. 396—A.I.R. 1928 Pat. 348—108 I.O. 923.

267. [Pro. S. 54 & Suc. S. 287] (I) The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be testamentary papers, which may be shown to be in the possession or under the control of such person.

(2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct *such person* to attend for the purpose of being examined respecting the same.

(3) *Such person* shall be bound to answer *truly* such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default.

(4) The costs of the proceeding shall be in the discretion of the Judge.

N. B.—"The word *truly* has been added to remove any doubt as to what is clearly the intention of the provision"—*Joint Committee Report.*

The Section:—This section resembles section 26 of the Court of Probate Act, 1857 (20 and 21 Vict. C. 77) and is practically a reproduction of that. It authorises the District Judge to compel production of testamentary papers from a custody in which they are. It does not oblige the applicant for administration to produce the will from his own custody or file it in Court with his petition. It will be quite sufficient if the applicant for letters is interested in the administration of the estate and can establish the existence of the will and if necessary can secure the production thereof by the person in whose possession it is, *Bun Ditta Mal v. Devi Ditta Mal*, A.I.R. 1931 Lab. 130—152 I.C. 627. The appellant cited the respondent, who was the executor of one Tulsidas Varajdas to bring in and prove his testator's will. The Division Court ordered the Respondent to lodge the will in Court and to take out probate, but directed that the appellant should pay half the costs of obtaining probate. On appeal, held, that the fund primarily liable to the costs of probate was the residuary estate etc : *Daya Bhai Tapidas v. Damodar Das*, 21 Bom. 76. In the *goods of Newton*, 8 B.L.R. Ap. 76, the Court held that the exemplification was an instrument which the Court could order to be produced. (Cf. sec. 289, *supra*).

Any paper:—Any paper of a testamentary character can be directed to be produced under this section. A duplicate is a part of a will and therefore a testamentary paper within the meaning of this section and can be ordered to be produced, *Killican v. Parker*, 1 Cas. Temp. Lee, 662.

Sub-sec. (3): Penalty for Disobedience or Contumacy:—The person ordered by the Judge shall *truly* answer the questions put to him. "The word 'truly' has

been added to remove any doubt as to what is clearly the intention of the provision." *Joint Committee's Report.* Disobedience of the Court's order under this section is punishable in accordance with the provisions of Chapter X of the Indian Penal Code, *vide* secs. 174, 175, 178, and 179, I.P.C.

268. [Pro. S. 55 & Suc. S. 238] The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

Proceedings of District Judge's Court in relation to probate and administration.

Procedure of Probate Proceedings:—The procedure of the District Court in probate proceedings should, as far as practicable, follow the provisions of the Code of Civil Procedure. Cf. *Yeshvant v. Shanker*, 17 Bom. 388; *Re Guru Charan*, 6 C.W.N. cxvii; *Sheik Azim v. Chandra Nath*, 8 C.W.N. 748. The expression "District Judge," includes a High Court, *vide* sec. 8 (bb), *ante*. Therefore, the proceedings in the Original Side of the High Court are in the contemplation of the section. Compare the Calcutta High Court Rule No. 99, Bombay Rule 603, Madras Rule, 474. The non-contentious proceedings can be dealt with by the District Delegates and the Registrar, *Chotalal v. Bai Kalulai*, 22 Bom. 261. It is mainly in the contentious cases that the question of the applicability of the C.P. Code arises, *Pakiam v. Innasi*, 19 Mad. 468. Cf. *Re Dintarini Dabi*, 8 Cal., 880 (882); *Radhashyam v. Ranga Sundari*, 24 C.W.N. 541; 59 I.O. 764. Read the notes under sec. 265, *post*, under the heading, "C.P. Code does not apply in its entirety." According to some opinion, apart from this section, and by virtue of sec. 141 of the C.P. Code, 1908, alone, all its provisions become applicable to probate proceedings. See the article in 22 C.W.N. xiv, xviii; Cf. *Bamgopal v. Radha Krishna*, 10 C.W.N. xev; also *Re Dintarini Dabi*, 8 Cal 880; *Fakirulla v. Thaker Prasad*, referred to in the aforesaid Article. "Circumstances of the case" may not permit the application of the provisions of the C.P. Code in some instances, to probate proceedings. The renewal of a probate application being quite a feasible thing, an applicant does not suffer from the dismissal of a previous application of his from default. Therefore, he need not resort to O.IX, r. 4 or r. 9. So it has been said that these rules do not apply in relation to a petition for probate, *vide Ramon v. Zumud*, 12 C.L.J. 185-14 C.W.N. 924; contra, *Veeramma v. Sufarao*, 62 I.C. 689. The following are some of the instances of the application of the provisions of the C.P. Code to probate proceedings:—(a) O. I, rr. 8-11, *Abhisam Das v. Gopal Das*, 17 Cal., 46; *Greebal v. Chunder Kant Mukherji*, 11 Cal., 218; *Hafiza Bai v. Kazi Abdul Karim*, 19 Bom. 88; (b) O. V. r. 17. *U Shore Min v. Maung Gui*, 8 Bur. L.J. 68-82 I.C. 973; *Re Dintarini Dabi*, 8 Cal., 880 (*supra*); (c) O. vi. r. 15. *Re Dintarini Dabi*, (*supra*). (d) O.IX, r. 9, A.I.R, 1958 All 14F; O.IX, r. 18;

Re Dintarini Dabi, 8 Cal., 880. Cf. *Khetramoney v. Shyamacharan*, 21 Cal., 580; (e) O. XI (Discovery and inspection), *Anilubala v. Rajendra*, 48 Cal., 800-28 C.L.J. 480-34 I.C. 227; (f) O. XXI, r. 47 (Execution), *Brij Coomares v. Ramrick*, 5 C.W.N. 781; (g) O. XXXII, *Re Amritalal*, 27 Cal., 350; See also *Natagopal v. Srigopala*, 28 C.L.J. 79; *Akhileswari v. Haricharan*, 40 C.L.J. 297; *Shoroshi v. Ananda*, 12 C.W.N. 6. (h) O. XXXIX, *Nirod Barani v. Chamatkari*, 19 C.W.N. 205; 27 I.C. 617; *Giribala Dasi v. Prokash Chandra*, 49 C.L.J. 484-A.I.R. 1929 Cal. 498 [Power to order inventory]; (i) Order XL (receivers), *Yeshwant v. Shakar*, 17 Bom. 388; (j) O. XLI, r. 5. *Brij Coomares v. Ramrick*, *supra*. (k) see 104 and O. XLIII, *Khetramoni's case*, *supra*. (l) see 115 (Revision), *Ibid*; *Girindra v. Rajeswari*, 27 Cal., 5; *Annaji v. Chandra Bai*, 17 Bom. 503. As to instances of provisions not applied—(1) O. XVI, r. 20, *Ravji v. Vishnu*, 9 Bom., 241; (2) O. IX, r. 9, *Rimai v. Kumudbandhu*, 14 C.W.N. 924; 12 C.L.J. 185; 7 I.O. 126; but see *Rallabandi v. Rallabandi*, 5 I.C. 639; (3) O. XXVI, r. 1: *Jageshwar v. Jagatdhari*, 2 Pat. L.J. 535; (4) O. XXXI, r. 1: *Nirod Barani v. Chamatkari*, *supra*; (5) O. XXXII, r. 4; *Sachindra Narain v. Heronmoyee*, 24 C.W.N. 588; *Radhashyam v. Ranga Sundari*, 24 C.W.N. 541, (*supra*).

Arbitration:—The provisions of the Second Schedule of the C. P. Code, 1908, do not apply to probate proceedings; therefore no reference to arbitration is permissible, *Re Briant*, 4 B.L.R. App. 49; vide also *Kedarnath v. Sarojini*, 3 C.W.N. 617; *Chella Bhai v. Nandubai*, 21 Bom., 885; *Troylukha v. Radharani*, 3 C.W.N. lxxviii; *Sarada Kanta v. Gobind Mohun*, 6 I.C. 912; the genuineness of a will cannot be determined by reference to arbitration, *Manmohini v. Banga Chandra*, 81 Cal. 857: 8 C.W.N. 197. The Court has got to judicially pronounce on the genuineness of a will and cannot delegate its functions to an arbitrator. *Gogi Bai v. Baijnath Rai*, A.I.R. 1950 All. 840. Cf. *Surja Prasada v. Shyama Sundari*, in which the will was allowed to be established by compromise. Vide under sec. 319, *Soudamini v. Gopal*, 21 C.L.J. 273. See now the present Arbitration Act, 1940.

Compromise in probate:—A *bona fide* settlement of disputes by compromise in a probate proceeding will be binding, provided it is for the benefit of the estate and not for personal advantage, *Shyamlal v. Rameswari*, 29 C.L.J. 82: 83 I.C. 273; see *Surja Prasad v. Shyama Sundari*, 14 C.W.N. 967. Cf. *Kunjilal v. Karla*, 14 C.W.N. 1068: 7 I.O. 740. Read the notes under the caption "Compromise" under secs. 283 and 295, *post*. An executor can compromise a probate proceeding (i.e. suit) by agreeing to the creation of a maintenance charge in favour of the contesting widow, *Sabirtri Thakurain v. F. A. Savi*, 12 Pat. 359-A.I.R. 1933 Pat. 306-146 I.C. 1. A compromise (or consent) in a probate proceeding only makes the case non-contentious, but does not take away the Court's duty to grant or refuse probate, *Janakbati v. Gujanand*, 20 C.W.N. 986: 1 Pat. L.J. 377: 1 Pat. L.W. 41: 37 I.C. 12; *Jagadish Chandra v. Upendra Chandra*, 48 C.W.N. 294; but see *Sarada Kanta v. Gobinda*, 12 C.L.J. 91: 6 I.C. 912, where it has been maintained that proceedings

in revocation are not suits within the meaning of XXIII, r. 8 of the C. P. Code, and therefore no adjustment of dispute by way of compromise is possible, *Bishunath Rai v. Sarju Rai*, 1931 A.L.J. 835 = A.I.R. 1931 All. 745 = 133 I.C. 403. A compromise as regards the due execution of a will is not lawful if its aim is to exclude evidence in proof of the will. No probate can be granted merely because caveator consents to the grant. The agreement is against public policy, *Ibid.* (per Mookerji J.); *Gouri Sankar v. Hari Bhabani*, 41 C.W.N. 848. Cf. *Monmohini v. Banga Chandra*, 31 Cal. 867; *Jageswar Nath v. Jagatdhari*, 2 Pat. L.J. 696. (1917) Pat. 192 : 5 Pat. L.W. 280 : 40 I.C. 346. Consent does not do away with the necessity of enquiry into the genuineness and due execution of the will; it simply makes a grant in common form possible, *Bishunath Rai v. Sarju Rai*, 1931 A.L.J. 835 = A.I.R. 1931 All. 745 = 133 I.C. 403. So, where a petition of compromise is filed in a probate proceeding, the proper procedure for the Court to adopt will be to call for proof of the will as in a non contentions proceeding and after satisfactory proof has been given, then to record the petition of compromise, *Gouri Sankar v. Haribhabani*, 41 C.W.N. 848. In consequence of the agreement between the parties, the Court after making an order for grant as in a non-contentious case, will append an annexure to the order embodying the terms of the agreement, *Jagadish Chandra v. Upendra Chandra*, 48 C.W.N. 294. Such an annexure may have the effect of varying the terms of the will, but all the same the parties, will be bound to regulate their conduct and their rights *inter se*, by the terms of the agreement, *Ibid.* If there is a bona fide dispute between the parties as to the validity of the will, an agreement may be reached between them not to apply for probate and such an agreement will not be considered to be against public policy, *Ibid.*

Grant in forma pauperis:—*Vide* at p. 505, *ante*.

Temporary Injunction:—A Probate Court is competent to grant a temporary injunction, *Nirod Barani v. Chamatkarini*, 19 C.W.N. 205; 27 I.C. 617; but this power should not be exercised where it is possible for the Court to grant relief by the appointment of an administrator *pendente lite*, *Ibid.*

Res judicata:—The Probate jurisdiction of the Court is a peculiar jurisdiction; therefore, the decision of any other Court touching a testamentary document cannot be said to be the decision of a "competent" Court within the meaning of sec. 11 of the C. P. Code, so as to constitute the bar of *res judicata* for a probate Court, *Chinnasami v. Harshara*, 16 Mad. 380. Again, the order of the Probate Court refusing a grant is not equivalent to a decision against the genuineness of the will; therefore, such an order of refusal will not operate as *res judicata* in a subsequent attempt of the applicant to obtain a grant by offering better proof of the execution and validity of the will, *Ganesh v. Ram Chandra*, 21 Bom. 583 (586). For the same reason, a dismissal for default under O. IX, r. 9 of a probate application does not preclude a second application for

the same purpose, *Bamani Dabi v. Kumudbandhu*, 14 C.W.N. 924 ; 12 C.L.J. 185 ; 7 I.C. 126 ; Cf. *Gnanamuthu v. Vanakoil*, 17 Mad. 379. Read the notes at p. 489, ante. A pronouncement of the Probate Court as to the genuineness of a will cannot however be re-agitated between the same contesting parties, *Faqir Baksh Singh v. Uderaj Singh*, 6 O.W.N. 624 = A.I.R. 1929 Oudh, 119 I.C. 456.

Limitation:—The Limitation Act does not apply to applications for probate or letters of administration, vide the cases cited at p. 499. Therefore, where a first application is dismissed for default a second application after 80 days of such dismissal will not be time-barred, see 17 Mad. 379, *supra*, at p. 503 ; *Zimali v. Wasudeo Trimbak*, I.L.R. (1948) Nag. 538 = 1947 N.L.J. 526. An executrix unsuccessfully contesting validity of execution on a previous occasion is not precluded from subsequently applying herself for a grant, *Sailabala Dass v. Gaidyanath Rakshit*, 32 C.W.N. 729 = A.I.R. 1928 Cal. 580 = 110 I.C. 512.

Execution:—The provisions relating to execution of decrees in the C. P. Code are applicable to execution of decrees of the Probate Court, *Brij Kumari v. Ramrick*, 6 C.W.N. 789. Therefore, stay of execution of a decree of the Probate Court under O. XLII, r. 5 is permissible, *Ibid.*

Receiver:—Vide notes under sec. 247, *supra*. For appointment of receivers in miscellaneous proceedings, vide *Bepin Behari v. Charu Chandra*, 35 C.L.J. 192 ; *Asadali v. Syed Mahomed*, 43 Cal., 986 : 20 C.W.N. 1009. The Court has a power to appoint a receiver, *Yeshwant v. Sanker*, 17 Bom., 388, Cf. sec. 269, post ; also 17 Bom., 686, cited at p. 505.

Common Manager:—A Probate Court issuing a grant cannot appoint a common manager without recalling the grant even if the will provides for the appointment of such common manager, *Hari Chaitanya v. Ramram Sinha*, A.I.R. 1928 Cal. 164 = 105 I.C. 626.

Discovery by Interrogatories and Inspection:—The provisions of Order XI of the C. P. Code apply to probate proceedings, *Anslabala v. Rajendra Nath*, 49 Cal., 800 ; 23 C.L.J. 480 ; 34 I.C. 227.

Guardian Ad litem:—Where citation is necessary upon a minor, a guardian *ad litem* should be appointed, *Naba Gopal v. Sri Gopal*, 23 C.L.J. 79 ; 33 I.C. 14, and the cases cited therein. But until the proceeding reaches a contentious stage O. xxxii, r. 4 will not apply, and a guardian may be appointed without his consent *Rudharyam v. Ranga Sundari*, 24 C.W.N. 541 (*supra*) ; also *Sachindra v. Hirav. Moyes*, 24 C.W.N. 588 (*supra*). Cf. *Ranmaya Gaorangini v. Betty Mahbati*, 31 C.W.N. 160 = A.I.R. 1927 Cal. 207 = 100 I.C. 177. Read the notes and cases under the heading, "Citation where the interested person is a minor" under sec. 188, *post*.

Withdrawal of application at appellate stage:—*Vide Babulal Mondal v. Sm. Abalabala, A.I.R. 1955 Pat. 126.*

269. [Suc. S. 239 & N.C.A., S. 3] (1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

N. B.—“Sub-sec. (2) incorporates the provision of Act VII of 1901, and as the provision is not incorporated in the Act of 1881, it excludes the persons to whom that Act relates from the purview of the clause”—*Notes on Clauses of the Original Bill.*

Protection of Property until grant is made:—This section confers on the District Judge a power very much similar to that provided for by sec. 195, *supra*. The District Judge when he thinks fit, for the protection of the property of the deceased, may appoint a person to take charge of such property, but the person so appointed will not be regarded as the legal representative of the deceased, nor will he be invested with that status for the purposes of any suit but his function will merely, be to *take and keep* possession of the property, or in other words, to protect it. *Cf. Joshoda Koonwar v. Gourie Byjnath, 2 Rev. Cor. Cr. Rep. per Jackson J.* The section, it should be noticed, creates a special jurisdiction in favour of the District Judge authorising him to interfere for the protection of the deceased's property for which ultimately an administrator may be constituted. The District Judge can assume jurisdiction under this section if some part of the deceased's property is within his territorial jurisdiction; but once he has assumed jurisdiction, he can exercise his powers hereunder even in relation to properties outside his territorial jurisdiction. *Mrs. N. Rego v. P. F. Rego, 29 N.L.R. 289 = 16 N.L.J. 86 = A.I.R. 1933 Nag. 178 = 144 I.C. 322.* The section is independent of any application made for the grant of probate or letters of administration and the powers conferred hereby can be exercised even where an application for letters of administration has been dismissed, *Ibid.*

Any Officer :—The officer so appointed will virtually be a receiver of the property. Cf. *Yeshwant v. Shanker*, 17 Bom. 388. Such an officer can be appointed only so long as a grant is not made, and cannot be appointed as against an executor. Cf. *Hafizabai v. Kazi Abdul*, 19 Bom. 83, cited under sec. 266, *supra*; also *Winsor v. Winsor*, 22 Bom. L.R. 396 : 57 I.C. 116. The income received by such an officer ranks as income of the executor and can be assessed as such under sec. 41 (1) of the Income-Tax Act, 1961 M.P.L.J. 609.

Nature of powers :—The power of interference for the protection of the deceased's property conferred hereby is of a very wide nature. Such power will include the issue of an order of injunction restraining any person whether party to the proceeding or not, from doing any act prejudicial to the estate. *Mrs M. Rego v. P. F. Rego*, 29 N.L.R. 298 = 16 N.L.J. 86 = A.I.R. 1933 Nag. 173 = 144 I.C. 922.

Sub-sec. (2) : Exception :—The repealed Probate Act did not contain any such provision; therefore, here an exception is made excluding the operation of the section to a Hindu, Mahomedan, Buddhist, Sikh or Jaina or an exempted person. Consequently, it has been held that the rule of the Court of Chancery that a receiver will not be appointed against an executor unless gross misconduct is shown, is not applicable to the case of an executor of the will of a Mahomedan, *Hafizabai v. Kazi Abdul*, 19 Bom. 83. The section will not apply also to the property of an Indian Christian (for definition see sec. 2-d. *ante*).

270. [Pro. S. 56 & Suc. S. 240] Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

Jurisdiction of the District Judge :—The District Judge will have jurisdiction to grant a probate or letters of administration under this Act, if the testator or the intestate (as the case may be), at the time of his decease, had a fixed place of abode, or any property (moveable or immoveable) within the territorial jurisdiction of the Court, Cf. *Kamona Sundary v. Hurrolal*, 8 Cal., 570; *Fardunji v. Nivajbai*, 17 Bom. 689. So, there was no jurisdiction of the Court, where the deceased had no residence, nor left any assets, within its local area, *Re Learmouth* 24 Mad., 120. If the deceased resided at the time of his death within the jurisdiction of the Court or has left assets within such jurisdiction, the Court cannot refuse grant of probate on the ground that a part of the estate of the deceased is outside its jurisdiction or outside the province. *Lal Singh v. Kishen*

Devi, A.I.R. 1929 Cal. 72—I.I.O. 391. A District Judge will have jurisdiction to make a grant if a portion of the estate, however small, exists within the area of his judgeship; this will be so even if the deceased had no fixed place of abode within his jurisdiction or even if the bulk of the deceased's property is within another jurisdiction and Judge need not dismiss the application for the grant. *Debi Baksh Singh v. Ashtbhija Ratan*, 1937 A.L.J. 859—A.I.R. 1937 All. 670. Read also *Re Will of Ramchand Gurdasmal*, A.I.R. 1956 Mad. 274; *Damodar Lal v. Govind Nath*, 1956 Nag. L.J. 524—A.I.R. 1956 Nag. 209; *Subedar Durgey v. Madhab Prasad*, A.I.R. 1958 Assam, 81.

Fixed place of Abode :—This means the same thing as "residence," and may at times be equivalent to the deceased's domicile. Cf. *Lamb v. Smith*, 16 L.J. Exch. 207; *Gopal Chandra v. Kurnodhar*, 7 W.R. 349. That place is a man's fixed place of abode where he ordinarily lives, has his family or carries on business and so forth. *Ugar Chand v. Sirajma*, 2 Bom. L.R. 605. For "residence," see *R v. North Curry*, (1825) 4 B. & C. 953; *Ex parte Brull*, L.R. 16 Ch. D. 487; *R v. Tyrone*, (1901) 2 I.R. 407 (510); *Abdul Razak v. Basiruddin*, 17 C.W.N. 405: 16 O.L.J. 457; *Kumud Nath Roy v. Rai Jatindra Nath*, 38 Cal., 504: 15 C.W.N. 399: 13 O.L.J. 221; *Anilabala v. Dharendra*, 48 Cal., 577: 32 C.L.J. 314: 25 C.W.N. 178: 57 I.C. 768; *Mubarik Shah v. Wajeb-ul-nissa*, 59 P.L.R. 1902; *Fernandez v. Wray*, 25 Bom., 176. The word "fixed" in the section does not mean present. Residence for ten months at a place prior to death was considered to constitute a fixed place of abode, in order to confer jurisdiction on the Judge of the place, *Sobhag Rani v. Srimati Lado Rani*, 11 Lab. L.J. 11—A.I.R. 1929 Lab. 282—116 I.C. 305. An employee of a Railway Company had, for twenty years prior to his death, been stationed at a particular place and resided there in a Railway quarter; held, that he had a fixed abode within the meaning of this section at that Railway Station, although he was liable to be transferred from there to another station, *Govind v. Anant*, 71 I.C. 816. Cf. also *Goswami v. Gorerdhan*, 14 Bom., 541; *Fatima Begum v. Sakina Begum*, 1 All., 61; *Ananga Mohan v. Balai Chand*, 38 C.L.J. 386.

Property :—Jurisdiction will be created also by situation of the property of the deceased of any kind—moveable or immoveable. Thus, a non-British subject executed a will out of British India, but he had left property in India, which created jurisdiction here, *Bhanrao v. Lakshmilai*, 20 Bom., 607; *Golem Sukkan v. Mahomed Rouf*, 20 W.R. 286. Cf. sec. 5 (1), ante; *Ravji Ranchod v. Vishnu Ranchod*, 9 Bom., 241. In this case the property was in Thana, and the will was executed in Bombay. The District Judge of Thana was held to have jurisdiction. The magnitude of the property within one jurisdiction is not of much consequence in the matter. *Ashtbhija Ratan Kuer v. Thakur Devi Baksh Singh*, 48 C.W.N. 443—(1944) 1 M.L.J. 469—1944 A.L.J. 167—A.I.R. 1944 P.C. 29—212 I.C. 350 (P.C.). It seems that where the property at one place is extremely insignificant, the

judge of that place, though having jurisdiction, will not exercise it for the purpose of making a grant, *Bai Mancha v. Bai Ganga*, 1 Bom. L.R. 666. But see *Re Mohendranarain*, 5 C.W.N. 877. Read however see. 271, post, which reserves a discretion for the Court and also 48. C.W.N. 443 (P.C.), *supra*, and *Re the Will of Ramchand Gurdasmal*, A.I.R. 1956 Mad. 274. If the quantum of the deceased's property be nil, there would be no occasion for any grant, *Kaljan Kutty Amma v. Gouri Kutty Amma*, I L.R. (1958) Trav. Co. 686 = A.I.R. 1958 Trav. Co. 352. Cf. A.I.R. 1954 Pat. 175. For the purpose of this section, it will be enough if the property be found in the deceased's possession, though he may not actually own it, inasmuch as a Probate Court will not enter into the question of the title. *Ran Bahadur v. Maharane Rajrup*, 4 C.L.R. 498. Cf. *Mahasundar Koer v. Babu Ratan Prasad*, 1 Pat. L.W. 370 : 35 I.C. 416. A District Judge has full discretion to entertain an application for probate if the deceased has left some moveable property within his jurisdiction, *Govind v. Anant*, 71 I.C. 816. Debts payable to the estate of the deceased within the jurisdiction of the Court are such assets and moveable properties as would entitle that Court to make a grant hereunder, *Khushchand v. Motil Bai*, 30 S.L.R. 201 = A.I.R. 1936 Sind. 150 = 165 I.C. 202. For the purposes of this section, a Bank deposit constitutes moveable property. *Sobhag Rani v. Srimati Lado Rani*, 11 Lah. L.J. 11 = A.I.R. 1929 Lab. 282 = 116 I.C. 905. A share in a certain moveable property which testatrix has acquired by inheritance from her deceased son is property as understood herein, and the Court within whose jurisdiction such property has been left by her will be competent to entertain an application for probate of her will, *Mahomed Kasim v. Mt. Mazharbi*, I.L.R. (1948) Nag 389 = 3 D.L.R. (Nag.) 59 = 1948 N.L.J. 683 = A.I.R. 1948 Nag. 90. As to how far copy-right created in the United Kingdom will be property for the purposes of this section, see *Blackwood & Sons v. A. N. Parasuraman*, A.I.R. 1959 Mad. 410.

Bifurcation of the District :—The jurisdiction to grant probate cannot be taken away because the properties dealt with in the probate are within the jurisdiction of another Court, by reason of a bifurcation of the district, *Subramania v. Ramaswami*, 31 I.O. 499 (Mad.).

271. [Pro. S. 57 & Suc. S. 241] When the application is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district,

Disposal of application made to Judge of district in which deceased had no fixed abode.

or, where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction.

Discretion of Court where Jurisdiction not created by Residence :—Under this section, if jurisdiction of the Court is invoked on the ground, not of residence, but

of the situation of the property, the Court can, in its discretion, (1) refuse the application, leaving it to be dealt with by some other Judge who can deal with it more conveniently, (2), in the case of letters of administration, make a grant limited to the property within its own jurisdiction. See *Re the will of Ramchand Gourdas Mal*, A.I.R. 1956 Mad. 274. The discretion vested in the Court hereby will have no application where there is no Court of concurrent jurisdiction in India to entertain the application, *Bhanrao v. Lakshminas*, 20 Bom. 607. Consult also the cases cited under sec. 270, *supra*. For a somewhat analogous provision, see sec. 9 (3) of the Guardians and Wards Act, 1880. The fact that the deceased lived in Calcutta or that the major portion of his property is situated in Calcutta or that all the witnesses to the will live in Calcutta, is no ground for refusing to entertain an application for probate by the District Judge of 24 Perganas. The applicant for a probate is *de minimis litis* and his choice should be given effect to, unless there are sufficient grounds made out to show as to why the proceedings should not be held at the District Court, *Ananga Mohan v. Balai Chand*, 83 C.L.J. 386 : 69 I.C. 523. The Court is not deprived of its discretion, under this section because it exercised it on a previous occasion so as to permit the proceedings to go on, *Forbes v. Peterson*, I.L.R. (1941) 2 Cal. 1-45 C.W.N. 73-A.I.R. 1941 Cal. 417=196 I.C. 111. Cf. A.I.R. 1942 Cal. 283 : 201 I.C. 545.

District:—It will be seen that the section makes use of the expression *Judge of the District* and not the "District Judge," which term has been defined in sec. 3 (15) of the General Clauses Act, as not including a High Court in its Original Side. As to whether the word, "District" will include the town of Calcutta, the point was raised but left undecided in *Ananga Mohan's Case*, *supra*. Any how, the High Court in its Original Side has at least the discretion which this section has given to a judge of the district to refuse an application for grant of probate of a will when the deceased testator was not living within its jurisdiction, *Forbes v. Peterson*, I.L.R. (1941) 2 Cal. 1-45 C.W.N. 73-A.I.R. 1941 Cal. 417=196 I.C. 111; also A.I.R. 1942 Cal. 283=201 I.C. 545.

Appeal:—When a District Judge exercises his discretion under this section, he cannot be said to be making an order under the Act so as to give a right of appeal under sec. 299. He is merely deciding to proceed with the application for probate and no formal order is really made by him and no question of appealability really arises, *Fukirji Navroji v. Maherban Fareedoon*, 44 Bom. I.R. 609=A.I.R. 1942 Bom. 276=202 I.C. 688. The section does not require any formal application to move the Judge hereunder, and he can proceed even *suo motu* to decide to go on with the proceeding; so the matter will not fall within the scope of sec. 299 to create a right of appeal, *Lala Bhupendra Narain v. Ashtibhuja Ratna Kuer*, 1932 A.L.J. 418=A.I.R. 1932 All. 379=189 I.C. 156.

272. [Pro. S. 58 ; Suc. S. 241A ; D. D. A. S. 3] Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as hereinafter provided, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

Grants by District Delegate :—This section empowers a District Delegate to grant probate or letters of Administration under this Act, subject to two conditions, (1) that the case is a non-contentious one, (2) that the testator or the intestate (as the case may be) had a fixed place of abode within the jurisdiction of the Delegate. No jurisdiction cannot be created in favour of such Delegate by the situation of properties as under sec. 270, *supra*. Cf. Sec. 276 (2) (b), *infra*.

Fixed place of Abode :—The expression does not mean permanent residence at one place in a man's life, but residence for a considerably long time, *Gorind v. Anant*, 6 N.L.J. 49 : 19 N.L.R. 45 : A.I.R. 1923 Nag 146 : 71 I.C. 816. Also vide at p. 514, *ante*.

Non-contentious Proceeding :—A proceeding for grant is contentious when there is an appearance with a view to opposing it. Read the notes under sec. 295, *post*. Cf. *Violet Paterson v. A. E. Forbes*, 15 Luck. 107—1930 O.W.N. 932—A.I.R. 1940 Oudh, 16—184 I.C. 685. The withdrawal of the pleader for the objector from the proceeding does not transform it into a non-contentious one. The withdrawal of the pleader does not mean the withdrawal of the opposition, but it simply renders the suit an undefended one. Therefore, after entering of appearance of opposition, probate cannot be granted in common form, *Phonindra v. Nagendra*, 39 C.L.J. 569 : A.I.R. 1925 Cal., 75. Cf. *Chotalal v. Bai Kalubai*, 22 Bom. 261 (266). Vide also sec. 286, *post*. The moment an application for revocation of a grant made by District Delegate is presented before him, the matter becomes contentious and an order under sec. 288 for return of the case to the District Judge has to be made, *Kailash Chandra v. Nanda Kumar*, 48 C.W.F 751—A.I.R. 1944 Cal., 385. For the "common form" practice of English Law and the Calcutta Original Side Rules, Ch. XXXV, R. 38, read *Southern Bank's case* in 62 C.W.N. 444—A.I.R. 1958 Cal. 377 [N. B. This case points out the difference between the English practice of calling in the grant and the Indian practice of revocation].

273. [Pro. S. 59 & Suc. S. 242] Probate or letters of administration shall have effect over all the property and probate or letters of administration. estate, moveable or immoveable, of the deceased, throughout the State¹ in which the same is or are

1. Substituted by the A.O. 1950 for "provinces"

granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted;

[P. A. of 1903, ss. 2(2), 3(1)] Provided that probates and letters of administration granted—

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the State¹ does not exceed ten thousand rupees.,

shall, unless otherwise directed by the grant have like effect throughout² the other States.^{***}

⁴The proviso to this section shall apply in India⁵ after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation or after the date in proceedings which were pending at that date.

⁶The proviso shall also apply in India⁵ *** after the *separation of Pakistan from India to probates and letters of Administration granted before the date of the separation or after that date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan.

Conclusiveness of Grant:—A grant takes effect over all the properties of the deceased in the province (State) in which it is made, and (1) is conclusive as to the representative title against the debtors of the deceased or the persons holding his property, and (2) affords protection to such debtors or holders of property making payment or delivering property to the grantee. *Kurrutulain v. Peara Shahab*, 39 Cal. 116 (P.C.). Cf. *Ashithuja Ratan Kuer v. Thakur Devi Bahk*

2. Substituted by the A.O. 1948 for "whole of British India"

3. The words "of India" omitted by the A.O. 1950

4. Inserted by the A.O. 1937

5. Substituted by Act III of 1951, sec. 3 and Schedule.

6. Added by the A.O. 1948

*The 15th of August, 1947 was the date of separation.

Singh, 48 C.W.N. 443 - (1944) 1 M.L.J. 469 - 1944 A.I.R. 1944 P.C. 29 - 212 I.C. 890, P.C.; **Akshay Kumar v. Nanda Lal**, I.L.R. (1946) 1 Cal. 492. It is conclusive as to the representative title of the grantee, but not as to the validity of the contents of the will itself, **Re Bhoba Sundari**, 6 Cal. 460 (469). Cf. **Chau Kit v. Ho Tung**, 1902 A.C. 257; **Pinney v. Hunt**, 6 Ch. D., 98; **Chintamon v. Ramchandra**, 84 Bom., 589; **Kisaribai v. Nuzhat**, 38 Bom., 427; **Rajendra v. Manik**, 8 A.L.J. 1068; 11 I.C. 286. It is such conclusive proof, with greater force, particularly in relation to the persons who have been actually cited in the proceeding, **Forbes v. Paterson**, I.L.R. (1941) 2 Cal. 1 - 45 C.W.N. 739 - A.I.R. 1941 Cal., 417 - 196 I.C. 111. A grant is in the nature of a judgment *in rem*, and takes effect against the whole world and not only against the parties to the litigation, **Jeswant Lal v. Goresdhan Lal**, A.I.R. 1937 Lah. 804 - 169 I.C. 541. **Scottish Union & National Ins Co v. Raushan Jhan**, 20 Luck. 194 - 1945 O.W.N. 8 - A.I.R. 1945 Oudh, 152; **Saroda v. Gobind**, 12 C.L.J. 91; 6 I.C. 912. The grant of letters of administration so long as it subsists is conclusive evidence as regards the proper execution of the will and the legal character conferred on the administrator, **Mt. Daropli v. Mt. Santi**, A.I.R. 1929 Lah. 483 - 116 I.C. 452. The grant operating *in rem*, a debtor to the estate cannot question its legality, **Scottish Union & National Ins. & Co v. Raushan Jehan**, *supra*. A probate is evidence of the will against all persons interested under the will, **Brajanath v. Annanda**, 8 B.L.R. 208; **Kanhyalal v. Radha Churn**, 7 W.B. 338; **Komollochun v. Nilruttun**, 4 Cal., 360. The title conferred on the grantee by the grant "is obviously convenient as tending to facilitate the administration of the estate of the deceased, and the adjustment of the rights of all parties connected with it," **Lalitmohan v. Radharaman**, 15 C.W.N. 1021; 13 C.L.J. 547 (555). Cf. sec. 41 of the Ind. Evidence Act; **Concha v. Concha**, 11 A.C. 541; **Mason v. Swift**, 8 Beav. 368; **Plume v. Beali**, 1 P. Wms 385. This fundamental distinction should always be borne in mind that the grant is conclusive as to the *animus probandi* of the testator but says nothing about his ownership of property, or the construction of his will, **Raj Rani v. Dwarka Nath**, 21 Luck. 314 - A.I.R. 1946 Oudh, 193 - 233 I.C. 206. Comp. **Ramcharan v. Dharohar**, 81 Pat. 993 - A.I.R. 1954 Pat. 175. This section does not affect a suit for declaration of the plaintiff's right to succeed to joint family property, **Verkalanarayana v. Subrammal**, 6 M.L.T. 116; 4 I.O. 1046. Cf. 23 C.W.N. 658. Besides the matters mentioned in the section the probate is not conclusive as to the other collateral matters; it is not *prima facie* evidence of the testator's death or his ownership in the property devised, **Chettiar Firm v. Kulsum Bibi**, A.I.R. 1936 Rang. 103 - 161 I.C. 619; nor does it establish testator's power of disposition over the devised property, **Komalangi Ammal v. Sowbhagiammal**, 54 Mad. 24 - 59 M.L.J. 529 - A.I.R. 1931 Mad. 37 - 128 I.C. 476. The section gives an indemnity to all debtors of the estate, making payment to the holder of the representative title on the strength of a grant made to him. But the benefit of such an indemnity will not go to a banker-debtor of the estate who, knowing full well that his customer-administrator is going to mis-apply the

trust money, makes payment to him with his eyes open, *Imperial Bank of India, Madras v. Krishnamurthi*, 65 M.L.J. 471 = A.I.R. 1938 Mad. 628 = 144 I.C. 479. For the utility of this section as a measure of protection for, or indemnity to, all persons dealing with grantees of administration, vide also *Akhay Kumar Pal v. Nandalal Das*, I.L.R. (1946) 1 Cal., 492. Even if the grant has been erroneously made in favour of a wrong person, it will be quite safe for all people of the outside world to deal with such a wrong person armed with a grant from a Court of Law, *Ibid.*

The grant being conclusive as to the representative title of the grantees, the position becomes that he is placed in the chair of the deceased and clothed with all the powers of the latter, so much so that what the deceased could do, could be done by himself. Thus, for example where a person entered certain premises with the leave and licence of the deceased, the administrator, if he so desires, can terminate the license and ask the licensee to vacate the premises, *Ma Gyi v. Maung Tet*, A.I.R. 1934 Rang 291 = 161 I.C. 971.

Province (State):—For the definition of the term, see sec. 2 (g), ante. In consequence of the said definition, Agra and Oudh, though under one Government are not one province for the purposes of the section, *Deli Vaksh v. Ashtikhaaja*, 1937 A.L.J. 859 = A.I.R. 1937 All. 670.

Proviso:—This proviso was added by sec. 2 of Act XIII of 1875 and replaced by sec. 9 (1) of Act VIII of 1903. Formerly, a grant by the High Court did not operate beyond its territorial limits, *Re Duncan*, 1 B.L.R. (O.C.) 9; *Re Nechterlain*, 1 B.L.R. (O.C.) 19. The effect of the proviso is to make the grant by (1) a High Court, (2) by a District Judge in case where the deceased had a fixed abode within such Judge's jurisdiction and left properties not exceeding Rs. 10,000, outside that jurisdiction, operative throughout India, unless the grant itself directed otherwise. Cf. *Subedar Durgey v. Madhab Prasad*, A.I.R. 1958 Assam, 81 [Probate when becomes effective as against property outside State]; *Re Haji Ismail*, 6 Bom. 452 (460); *Re Shama Churn*, 1 Cal. 32. The Oudh Chief Court is a High Court within the meaning of this section, *Forles v. Peterson*, I.L.R. (1941) 2 Cal. 1 = 46 C.W.N. 739 = A.I.R. 1941 Cal. 417 = 196 I.C. 111; also A.I.R. 1942 Cal. 288 = 201 I.C. 545. Zanzibar being a district in the Bombay Presidency, it has been held that a probate granted by the Consular Court in Zanzibar has effect over the deceased's property in Bombay, *Macleod v. Consul-General*, 8 Bom. L.R. 725. Cf. *Debendra v. Administrator-General*, 35 Cal. 965 (cited at pp. 488-89, ante).

Grant to Administrator-General:—Vide section 24 of Act III of 1913 (Administrator-General's Act) and *Re Hewsan*, 4 Cal. 770. Read the notes and cases at p. 447, ante, under the heading, "Administrator-General's Right."

N.B.—For rules of the different High Courts, see Calcutta Rules, 13, 14, 21, Hachlis Book, pp. 850 & 852; Bombay Rules, 558, 559; Madras Rules, 463.

Grant—subject to furnishing Security :—Where an order for grant of Probate is made subject to furnishing security, there will be no grant till the ordered security is furnished; such an order will not bar by res judicata a second application for probate, *Kiran Kumari v. Seihani Prabhavati*, I.L.R. (1961) 11 Raj. 881—A.I.R. 1962 Raj. 139.

274. [Pro. S. 60 ; Suc. S. 242A & P.A. of 1903 ; Ss. 2(3), 3(2)]

Transmission to High Courts of certificate of grants under proviso to section 278. (1) Where probate or letters of administration has or have been granted by a *High Court* or *District Judge* with the effect referred to in the proviso to section 273, the *High Court* or *District Judge* shall send a certificate thereof to the following Courts, namely :—

(a) when the grant has been made by a *High Court*, to each of the other *High Courts*;

(b) when the grant has been made by a *District Judge*, to the *High Court* to which such *District Judge* is subordinate and to each of the other *High Courts*.

(2) Every certificate referred to in sub-section (1) shall be made as nearly as circumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the *High Court* receiving the same.

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in section 276 and 278, to be situate within the jurisdiction of a *District Judge* in another State, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such *District Judge*, and such copy shall be filed by the *District Judge* receiving the same.

Rule 767 of Belchamber's Rules lays down that with every certificate to be sent to a *High Court* under this section the Registrar shall send a copy of the Inventory of the property and effects of the deceased. Also those rules provide that every petition should be accompanied by a certificate that no intimation has been received of a previous grant.

Form of certificate:—*Vide Sch. IV.*

275. [Pro. S. 61 & Suc. S. 243] The application for probate or letters of administration, if made and verified in the manner hereinafter provided, shall be conclusive for the purpose of authorising the grant of probate or administration: and no such grant shall be impeached by reason only that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

Consideration of the section will show that it is enacted for the purpose of authorising the grant of administration and rendering it conclusive even though there might be incorrect statements or omissions in the application upon which the grant is issued and have no reference to the valuation of the estate for the purpose of levying a Court-fee upon it. It was enacted for jurisdictional and not for fiscal purpose. *In the Goods of Sasson*, 21 Bom. 678 (676).

When after grant of letters of administration by a District Judge, it is found that there is property left by the deceased outside the jurisdiction of the District Judge and it therefore becomes necessary to obtain letters of administration from the High Court, the proper course is for the grantees to apply to the District Judge to revoke the letters of administration granted, and after obtaining their revocation to apply to the High Court for a new grant. *In the Goods of Rose Anne D'Silva*, 25 All. 955. The grant of probate is a decree which no other Court can set aside except for fraud or want of jurisdiction. So where it is alleged that probate has been wrongly granted, the proper course is to apply to the Court which granted the probate to revoke the same.

Sembles;—A person interested by assignment in the estate of the deceased may, where a will has been set up and proved at variance to his interests, apply for the revocation of probate of the will so set up. *Kemal Lechon Dutt v. Nilrattan*, 4 Cal. 360. Vide also the notes and cases at p. 491, ante.

A will, on the evidence, was held duly proved. An application for revocation of probate was made by a judgment-creditor who had attached his debtor's right, title and interest in the family estate, whereof a one-fourth share would, but for this will which made other dispositions, have been inherited by such debtor. Whether such an attaching creditor can oppose the grant of probate or apply to have it revoked, is a matter of grave doubt; at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. *Nilmoney Singh v. Umanath Mukherjee*, 10 Cal., 19; *Bajnath Sahai v. Despultry Singh*, 2 Cal., 208 has been referred to and 4 Cal. 360 distinguished.

Administrator-General;—*Vid.* under the next section, at p. 528, *infra*.

276. [Pro. S. 62 & Suc. S. 244] (1) Application for probate or for letters of administration, with the will Petition for probate. annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238, and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

- (a) the time of the testator's death,
- (b) that the writing annexed is his last will and testament,
- (c) that it was duly executed,
- (d) [P. A. A. of 1889, S. 3] the amount of assets which are likely to come to the petitioner's hand, and
- (e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state,—

- (a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge ; and
- (b) [D. D. A., S. 4] when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) [P. A. A. of 1903, Ss. 2(4) & 3(3)] Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hand is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.

N. B.:—"The Law to be reproduced is contained in sec. 244 of the Act of 1865 and sec. 62 of the Act of 1881. The latter Act, however, contains the additional words 'or for letters of administration with will annexed' and also the words 'or in the cases mentioned in sections 24, 25 and 26, a copy, draft or statement of the contents thereof.' The provisions of the Act of 1881 seem necessary

to complete the law and they have been adopted *mutatis mutandis* in the clause"—
Notes on Clauses of the Original Bill.

Section retrospective:—The section lays down a rule of procedure and not a substantive law and is therefore retrospective in operation, *Pitam Lal v. Kalla Ram*, 63 All. 687 = 1931 A.L.J. 711 = A.I.R. 1931 All. 489 = 196 I.C. 284 (F.B.).

Section not exhaustive:—The section is not exhaustive in its terms, and exact compliance with its provisions is not essential, where by reason of a peculiarity, this is impossible, *Sidney Thomas, In re*, I.L.R. (1945) 2 Cal. 672 = A.I.R. 1949 Cal., 560. Read the notes under the next heading.

Petition for Probate or Letters:—The section lays down the manner in which a probate application is to be drawn up and the particulars it should contain. The petition should be in English or in the language of the Court and is to be accompanied by the will, or its copy or contents (if the original is not available, *vide* secs 237, 238 and 239), and should contain the particulars mentioned in the clauses (a) to (e). Only the executor is entitled to probate, see 2(2). In the case of testacy without any executor, letters under this section would be necessary, see A.I.R. 1955 T.C. 177. Sub-section (2) specifies the particulars creating jurisdiction in favour of the District Judge or the District Delegate (as the case may be). Under sub-sec. (3) specification of the amount of assets beyond the State is necessary in view of the provisions of sec. 273, Proviso (b). *Vide* the Testamentary Rule No. 4 of the Calcutta High Court; also Bombay Rules Nos. 553-554; Madras Rule No. 458. Belch. 323, Rule 765; Belch. 505, Rule 740. The section has to be read with sec. 19-I of the Court-fees Act; so besides conforming to the requirements of this section, an applicant for probate or letters of administration with a copy of the will annexed must file in

Court a valuation of the property in the form set forth in Valuation of assets.

Sch. III and the Court has to be satisfied that the fee mentioned in Art. 11 of Sch. I of the Court-fees Act has been paid on such valuation. In absence of such valuation, the application will be defective and not in form, *Khub Chand v. Motil Bas*, 30 S.I.R. 201 = A.I.R. 1936 Sind. 150 = 165 I.C. 202. When the application for the probate or the Letters is presented before a Court other than a High Court, a notice of the application has to be forwarded to the Collector (under sec. 19-H of the Court-fees Act) for the purpose of the applicant's valuation being tested by him. Under section 19-I of the Court-fees Act, the applicant has to pay Court-fees on the valuation; *vide* notes under the heading "Probate Duty" at p. 523, *post*. As to the procedure to be followed with respect to this matter when the application is made to a High Court, read *In re Aratoon Stephen*, 32 C.W.N. 799. Note that the testamentary Court itself has got nothing to do in the matter of investigating the correctness of the applicant's valuation of the assets, It is for the revenue authorities to deal with that

question, *Ibid.* When an application for probate is made hereunder of a will of which a copy has been obtained, the original being in a foreign Country and it is found that the case more appropriately falls under sec. 228, the Court can grant letters of administration with a copy of the will annexed or in the alternative allow the petition to be amended, *Ram Lal v. Chanan Das*, I.L.R. 1989 Lah. 562-40 P.L.R. 1064-A.I.R. 1998 Lah. 349-178 I.C. 224. Literal compliance with the provisions of this section is rather an impossibility in a case covered by sec. 228, that is, the case of a will proved and deposited abroad. In a case under said 228, there must, *ex necessitate* be a relaxation of the application of this section, see *Sidney Thomas, In re*, I.L.R. (1945) 2 Cal. 572-A.I.R. 1949 Cal. 660, *supra*. An executor of a will probated in England, if within the jurisdiction of an Indian Court can apply here for probate (and not merely for letters of administration) in respect of the Indian assets by producing simply an authenticated copy of the will probated as above mentioned. If such executor happens to be a company having a branch office in India, such branch office can *qua* an executor apply for probate here, because the branch office and the company itself are one and the same for the purposes of probate, *A S. Allan, In re*, 62 C.W.N. 284-A.I.R. 1949 Cal. 184 (S.B.).

Notice that sec. 276, differentially from sec. 278, has not required the family members or the other relatives of the deceased to be mentioned in the petition for probate or for the letters of administration with a copy of the will annexed, as is necessary in the case of an application for letters of administration in the event of intestacy (*vide* sec. 278, *post*) ; read also the notes at pp. 526-27, *post*.

Amendment of petition :—Cf. *Meher Chand v. Lachman*, 9 Punj. L.R. No 79 ; *Ram Lal v. Chanan Dass*, I.L.R. 1989 Lah. 562-40 P.L.R. 1064-A.I.R. 1998 ; Lah. 349-178 I.C. 224, (*supra*).

Nature of Enquiry before the Probate Court :—In an application for probate the Court has no jurisdiction to enquire into the nature of the rights of the testator in the property covered by the will, *Rajeshwar v. Sukhdeo*, A.I.R. 1947 Pat 449. As to how an application hereunder operates, read *Kiran Kumar v. Sethani Probhabati*, I.L.R. (1961) 11 Raj 881-A.I.R. 1962 Raj. 139 ; *Raj Rani v. Raizada Moolraj*, 63 P.L.R. 908-A.I.R. 1952 Punj 62.

OL. (e) : Due Executed :—The expression is comprehensive enough to denote (1) the factum of execution, (2) proof of execution, (3) testator's approval of the contents of the will, (4) his testamentary capacity, (5) his free agency and so forth *Woomesh v. Rashmohini*, 21 Cal., 979. Ordinarily, due execution is proved by the declaration of an attesting witness under sec. 281. There is a presumption in favour of due execution, 21 Cal., 979, *supra*. Vide also the notes at p. 98. Cf. *Lloyd v. Roberts*, 12 Moo. P.C. 158 ; *Wright v. Sanderson*, 9 P.D.

149; *Blake v. Blake*, 7 P.D. 102; *Rajendra v. Manik*, 8 A.L.J. 1068; 11 I.C. 285.

CL. (d): Amount of Assets:—The petitioner should state all the assets which are likely to come into his hands, *Re Ezekiel Abraham*, 21 Bom. 189; *Kuppayammal v. Ammani Ammal*, 22 Mad. 345. The term "assets" means and includes all properties available for payment of the deceased's debts and includes immoveable properties, *Re Courjan*, 25 Cal., 66; *Amrita Nath v. Administrator-General*, 25 Cal., 54; *Re Simpson*, 1 Mad. H.C. 171. Statement of amount of assets serves three purposes, (1) it furnishes a basis for testing the accuracy of subsequent inventory and accounts, *Re Ezekiel Abraham*, 21 Bom. 189 (189), (2) it facilitates assessment of Stamp duty, (3) it fulfils the object of sub-sec. (3) and sec. 278, Proviso (b). It is enough if the property (which gives rise to jurisdiction) was in the deceased's possession; it is not for the Court to consider whether the deceased had title to it, *Ram Bahadur v. Rajrup*, 4 C.L.R. 498. As this section requires a list of all the assets in the probate application, it has been maintained that a probate cannot be asked for or obtained in respect of a part of the assets, *Re Umrao Mal Lodha*, 1942 A.M.L.J. 27. Read also the notes under the heading "Assets" under sec. 278. A petitioner for Letters can confine himself to the particular property in respect of which he wants administration, *Gurbachan v. Satwant*, 7 Lah. L.J. 288; A.I.R. 1925 Lah. 493. As to whether a probate can be refused on the ground that there are no assets to be administered, *vide Adwaiya v. Krishadhone*, 21 C.W.N. 1129, 42 I.C. 933. As to the effect of omission to give accurate statement of assets, see *Eiles Solomon v. Abdul Azeer*, 8 C.L.R. 169. *Vide also Court Fees Act*, 1870, Sch III, Annexure A; Act XI of 1899, sec. 3. According to the Oudh Court, if a testator had lost her right to the property her will in respect of that property will be a nullity, and no probate could be granted in respect of the same, *Shri Maharaj Nandeshwar v. Munni*, 9 O.W.N. 1078. This view can be supported only on the hypothesis that the existence or non-existence of the devised property is a pertinent issue in a probate proceeding.

CL (e): Executor named in the Will:—The executor being the only person entitled to a probate, such statement is essentially necessary. As to who can be executors, *vide at pp. 420-21*. An executor can be appointed by implication, sec. 222; for the appointment of a member of a firm as an executor, *vide at p. 422, ante*. As to whether a person charged by the testator to pay his debts will be his executor, see *Sardar Singh v. Swami Chakrapani*, I.L.R. (1946) All. 898—A.I.R. 1946 All. 367—225 I.C. 634. A contingent executor, that is, an executor whose appointment depends on the fulfilment of a contingency is not an executor, unless the contemplated contingency is fulfilled before the death of the testator.

Contrast with sec. 278:—The particulars of this section should be compared with those of sec. 278, which require the mention of the names and residences

of the deceased's relations and the right of the petitioner, which is not obligatory hereunder, *Ralph v. Hati*, 7 P.B. 1902. Although unlike section 278, this section does not require that "the family or other relations of the deceased" should be mentioned in the petition, still having regard to sec. 268, Illustration (ii), it has been opined that a grant made without citing parties who ought to have been cited, e.g. the daughter of the testator, is liable to be revoked, *Chubala De v. Menaka Sundari*, 86 C.W.N. 1010. Though there is much sense in this view, still it is vitiated by the fallacy of *Petitio principii*. No body ought to be cited within the meaning of the said Illustration unless such person's presence has been required by the other sections of this statute. Cf. *Re Atul Krishna Majumda*, 81 C.L.J. 224. In this connection read the notes at p 499, *ante*. Comp. also *Ramendra v. Shilrani*, 67 C.W.N. 715. The Lahore Court seems to have taken the right view in the matter by holding that relations whose names are given in the application for probate are not parties to the proceedings, as the law does not require notice to be given to them, *Teli Ram v. Badri Nath*, A.I.R. 1927 Lah. 609—100 I.C. 162. This being the position it necessarily follows that those persons are not necessary parties to the appeal arising out of the probate proceeding, *llid*. In a later case, the Calcutta Court has held that in a proceeding for the grant of probate of a will of a Hindu leaving his widow as his heiress, it is not incumbent for the applicant for probate to issue citation to the daughter's son, *Bhupendra Nath Naskar v. Bhusan Ch Mondal*, 41 C.W.N. 392. Also consult *Ramendra v. Shilrani*, 67 C.W.N. 715, *supra*.

Sub-sec. (2) requires that in order to entitle the District Judge or District Delegate to assume jurisdiction hereunder, it is necessary that the deceased should have a fixed place of abode within the jurisdiction of the Judge or the Delegate concerned, *Raj Rani v. Raizada Moolraj*, 69 P.L.R. 906—A.I.R. 1962 Punj. 62—relying on A.I.R. 1941 Cal. 670 & A.I.R. 1923 Nag. 145.

Probate of Noncupative or Oral Will:—Though an oral will is allowed by Part VI, only to the extent indicated in secs. 65 and 66, still such a will can be made by persons who do not fall within the scope of sec. 57, *supra*, and probate can be granted of such a will, see *Re Haji Mahomed*, 24 Bom., 8; *Pitam Lal v. Kalla Ram*, 53 All. 687—1981 A.L.J. 711—A.I.R. 1981 All. 489—136 I.C. 284 (F.B.). For strictness of proof of an oral will, vide *Manaji's case* cited at p. 125, *ante*; also *Bal Bhaddar v. Prag Dutt*, 41 All. 492: 17 A.L.J. 765; 50 I.C. 985; *Har Govind Singh v. Collector of Ettah*, I.L.R. (1937) All. 292—(1937) A.L.J. 610—A.I.R. 1937 All. 877—169 I.C. 744; *Mahalir Prasad v. Syed Mustafa Hussain*, 41 C.W.N. 933—(1937) 2 M.L.J. 618—80 Bom. L.R. 990—(1937) A.L.J. 1014—A.I.R. 1937 P.C. 174—168 I.C. 418 (P.C.), vide also notes at p 12, *ante* and under sec. 283, *post*. Cf. *Bhowaniram v. Dammar Sing*, 5 N.L.J. 163; A.I.R. 1922 Nag. 46; 66 I.C. 413; *Bai Sita v. Bhagi Lal*, A.I.R. 1922 Bom. 149; 12 I.C. 51 (Lah.). The fact that the oral will was taken down at the time the will was made would not

makes any difference in the eye of law in the matter of grant of probate. The fact would only be a strong piece of evidence to prove the contents of the oral will, *Pitam Lal v. Kalla Ram, supra.*

Probate Duty:—Is payable only on assets at the testator's death in India, *Re Abraham*, 21 Bom. 189; also *Re Hurro Lal*, 8 Cal. 670. The duty is to be assessed on the net assets, *Re Teviot Kerr*, 18 C.W.N. 121; *Re Quiniborough*, 22 C.L.J. 160—20 C.W.N. 591; *Collector of Maldah v. Nerode Kamini*, 17 C.W.N. 21. Cf. 3 C.W.N. 392; 21 Bom., 67; Calcutta Rules Nos. 31 and 32. For the meaning of the expression "Value of the Property" *vide* notes under the Heading "Probate Duty" under sec. 289, *post*. As to the necessity of filing a schedule of valuation, read the notes under the heading, "Petition for probate or letters", *supra*. Under sec. 19-H of the Court-fees Act, when an application for probate or letters of administration is made to any Court other than the High Court, the Court shall cause notice of the application to be given to the Collector, who as a Revenue Officer has got to test the valuation in accordance with the procedure prescribed in that section. The applicant has got to pay proper Court-fees in respect of his application on the valuation of his property under sec. 19-I of the Court-fees Act. As to this method of valuation when the application is to the High Court, *vide* notes at p. 524, *ante*. The power of appointment created by the will is property within the meaning of sec. 11 of the Court Fees Act, and the estate of the testator is liable to probate duty in respect thereof, and it should be included in the affidavit, *Re Lakshmi Narayan*, 25 Mad. 515. The practice of payment of duty is indicated in *Re Omda Bibi*, 26 Cal. 407. The duty need not be paid with the application, though it must be paid according to the direction of the Court, and always before the order of grant is made, *Re Aradhoney*, 5 C.W.N. 401; *Re Omda Bibee*, 26 Cal. 407. These duties are to be paid out of the deceased's estate and not out of the petitioner's estate, *Re the Goods of Ernest Raymond*, 1956 A.L.J. 185—A.I.R. 1956 All. 152.

Death Duty:—As to the question of determination of *Situs* in relation to death duties payable under the Succession Duty Act, 1934 of Ontario in respect of shares in Companies, see *Treasurer of Ontario v. F. E. Blonds*, 1947 M.W.N. 263 = A.L.R. 1947 P.C. 166, P.C. These sums are to be paid out of the deceased's estate, *Re the Goods of Ernest Raymond, supra.*

F^rma Pauperis:—*Vide* notes at p. 505, *ante*. Where an executor is not in possession of the property of his testator, and cannot get possession of it and where he has not the means of paying the necessary fee, he may be allowed to apply for probate in *forma pauperis*. *Re Downhai Haji Khan*, 18 Bom., 937.

Administrator-General:—Is exempted from verifying petitions and filing affidavits of valuation, see sec. 29 of the Administrator-General's Act (III of 1918);

Re McComesky, 20 Cal. 879; *Re Avdall*, 26 Cal., 404: 3 C.W.N. 298.

Probate of Codicil:—It is the practice of English Courts to require that codicils should be proved in the Court from which the probate of the will has been obtained, *Forbes v. Peterson*, I.L.R. (1941) 2 Cal. 1-45 C.W.N. 789-A I.R. 1941 Cal. 417-196 I.C. 111, and this practice should be followed in this country as well, see also A.I.R. 1942 Cal. 289-201 I.C. 545.

Question of validity of Will:—In a proceeding under this section for the grant of letters of administration, it is not for the Court to go into the question of the validity of the will with reference to the nature of the property, disposed of by it, but to confine itself to the questions of the genuineness of the will and the testamentary capacity of the testator, *Bua Ditta Mal v. Devi Ditta Mal*, A.I.R. 1931 Lah. 180-182 I.C. 527; *Hukane Chand v. Mt. Bhanwari*, A.I.R. 1952 Raj. 51. Read also the notes under the heading "Refusal of grant where will ineffectual" et p. 420, ante. It cannot likewise go into the question whether a gift over in the will is valid or not, *Sudhir Chandra v. Uttara Sundari Pal*, 97 C.W.N. 485-A.I.R. 1933 Cal 571-145 I.C. 684. It could seem that the Court can scrutinise whether the document in question is a will at all, that is, whether or not it is a declaration of intention as to property.

As to the effect of evidence of attesting witnesses falsifying regularity of execution and attestation, read *Subodh Kumar v. Soshi Kumar*, A.I.R. 1968 Cal. 264.

277. [Pro S. 63. & Suc. S. 245] In cases wherein the will,

In what cases translation of will to be annexed to petition.

Verification of translation by person other than Court translator.

copy or draft is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or, if the will, copy or draft is in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner, namely :

"I (A. B.) do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof."

N.B.—The words "copy or draft" which only occur in section 68 of the Act of 1881 have been adopted—"Notes on Clauses of the Original Bill.

According to the old Rules of the Calcutta High Court where the will is written in any of the eastern or foreign languages and characters there should be

a translated copy of it annexed by one of the sworn interpreters of the Court, if there is any interpreter for that language, or if it be in any other language then by any person competent to translate the same and such translation shall be accompanied by an affidavit of the translator that he read and understood the language and character of the original and that the same is a true and accurate translation, *vide* Beloh. Rule 741. But the subsequent Rule 88 provided that in the absence of definite rules the English practice would be followed. See now, Rules 22 and 23 of Chapter XXXV of the Original Side Rules; also *Purna Ch Dutt v. Sudhangsu S. Ghose*, I.L.R. (1946) 1 Cal. 1-49 C.W.N. 524-A.I.B. 1946 Cal 55-224 I.C. 299. Cf. Bombay Rule, 608. For English practice, *vide* Cootes, 15th Ed. 57-58, 797, as also *Bernal v. Bernal*, (1888) 3 My & Cr. 558; *Cliff's Trustees, In re.* [1892] 2 Ch. 299.

278. [Pro. S. 64 & Suc. S. 246] (1) Application for letters of Petition for letters of administration shall be made by petition distinctly written as aforesaid and stating—

- (a) the time and place of the deceased's death,
- (b) the family or other relatives of the deceased, and their respective residences,
- (c) the right in which the petitioner claims,
- (d) the amount of assets which are likely to come to the petitioner's hands,
- (e) when the application is to the District Judge that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge ; and
- (f) [D. D. A., S. 4] when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) [P. A. A. of 1903, Ss. 2(4) & 3(3)] Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.

N. B.—*Vide* the lengthy notes on clause 276 (now 278), in the Notes on Clauses of the Original Bill, where the purpose of the amendment has been

explained. The framers of the Bill followed the language of the Act of 1865, but the Joint Committee preferred to follow that of the Act of 1881, assimilating the wording of this section to that in sec. 276. *Vide* also the Joint Committee Report.

The Section:—The section specifies the various particulars which have got to be mentioned in an application for letters of administration. It should be compared with sec. 276, which contains a somewhat different Specification of particulars. Read notes under the heading, "Contrast with sec. 278" at p. 526, *ante*. Under clause (b), it is necessary that the family members and other relatives of the deceased should be shown in the application for letters of administration, otherwise the grant will be liable to be revoked under sec 263 [*Vide* Ill (ii) of that section]; *Charubala De v. Menaka Sundari De*, 86 C.W.N. 1010. (*f. Re Atul Krishna Majumdar*, 91 O.L.J. 224). In case of testacy without an executor, letters of administration under sec 276 is necessity because of sec. 213, *ante*. This Section applies only where there is intestacy (and no will). There is no necessity or indispensability for any "Letters" hereunder. Law only permits it as an expensive luxury, for finding out a legal representative of the deceased, capable of giving discharge for debts collected or for obtaining delivery of property, read A.I.R. 1955 T.C. 177. This luxuriant measure of Delay no ground of convenience cannot be denied to an applicant, simply refusal. *because he has come to Court, late, lnd.*

Mere non-citation cannot be made a ground of appeal if in the revocation proceeding at the instance of absentee or non-cited person, the will is found to be a genuine document, *Bal Govind v. Shri Ram*, I.L.R. (1947) All 209=1947 All. L.J. 82=A.I.R. 1947 All. 872. As to the effect of non-citation of the reverors who were fully aware of the widow's application for letters of administration, *Vide Kanariya Missir v. Dinanath Missir*, A.I.R. 1964 Pat. 270.

N B:—Secs 276-288 contain the special provisions for proof in non-contentious grants. These provisions seem not to require affidavits from the executor or the attesting witnesses, *Re Atul Krishna Majumdar*, 91 O.L.J. 224.

Assets:—*Vide* under the heading 'Amount of assets' at p. 526, *supra*. Though it is not necessary to decide what assets are likely to come to the petitioner's hand, still it is the duty of the Court to consider whether there is any asset at all to be administered, *Lalit Chandra v. Barkuntha*, 11 C.L.J. 28; 14 C.W.N. 468; 5 I.C. 895; *Rasandas v. Mahant Ramsarau*, 5 Punj W.R. 118; *Hajira Khatoon v. Mustafa Hussain*, 17 Luck 78=1941 O.W.N. 780=A.I.R. 1941 Oudh, 474=194 I.C. 410. If after a grant is made by the District Judge, it is found that there are other assets outside his jurisdiction, the proper course will be to apply

for revocation and then to apply to the High Court for a new grant, *Re De Silva*, 25 All 355. For the widespread and comprehensive scope of a grant by the High Court, see secs. 273 and 274, *supra*. The applicant for letters is to specify only the particular assets that are to come to his hands and not the entire assets of the deceased, *Gurbachan v. Satwant*, 7 Lah. L.J. 288; A.I.R. 1925 Lah. 493. But ordinarily, administration should be taken for the whole estate as the deceased's debts are charged on the whole estate, *Re Girish Chandra*, 6 Cal. 483; see *Ram Chand Seal*, 5 Cal., 2; *Kadombini Dasi v. Koylash Kamini*, 2 Cal., 431; *Pakiam Pilai v. Innasi Fernand*, 19 Mad., 458; *Mancharje v. Narayan Lukshumanji*, 1 B.H.C.R., 89.

Creditor's Application:—*Vide* Belch. 810; Rule 745.

Original Side of High Court:—*Vide* Calcutta Rules, 9, 10 and 11; Bombay Rules, 570 and 571.

Joint administration:—Joint Letters can be granted only under special circumstances, *Stoney v. Stoney*, cited at p. 415, under cl. (d). The Court ordinarily prefers a sole administration to a joint administration, *vide* under sub-sec. (2) at p. 409, *ante*.

Title Paramount:—The question of title paramount cannot be gone into in a proceeding for grant at the instance of an objector, as such a question has nothing to do with the question of grant, *Debendra v. Surendra*, 5 Pat. L.J. 107, Cf. *Midnapore Zemindary Co. v. Muk'akeshi*, 17 C.W.N. 615. Read also the notes at pp. 408 and 419, *ante*.

Grant in absence of estate and debt, if allowable:—As to whether any grant can be made when there is no estate to be administered, no debt to be paid, read *Hajira Khatoon v. Mustafa Hussain*, *supra*; *Lalit Chandra v. Baikuntha*, *supra*; read also the cases and notes at p. 410, *ante*. No grant can be made in aid of an ulterior object for any part of the estate, *vide* p. 410, *ante*. As to the advisability of granting letters of administration in cases where there is a dispute as to the existence or non-existence of assets of the deceased, read the notes at p. 410; remember, however, that with respect to this question some difference should be made between administration upon intestacy and administration *cum testamento annexo*.

Administration of Joint Hindu Property:—Where the deceased and the applicant are members of a Joint Hindu family, such applicant is not entitled to letters of administration, *Uttam Devi v. Dinanath*, 86 P.R. 1919; 51 I.C. 661. *Vide* under the headings, "Pass by Survivorship" at p. 870, and "Joint Hindu Family" at p. 411, *ante*.

279. [Pro. S. 65 ; Suc. S. 246A & P.A.A. of 1903, S. 2(5)]

Addition to statement in petition, etc., for probate or letters of administration in certain cases. (1) Every person applying to any of the Courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout *India,

shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon.

(2) The Court to which any such application is made under the proviso to section 273 may, if it thinks fit, reject the same.

Additional statement in Petition for Grant throughout India:—Where a grant is sought to have effect throughout India, the petition, should state (a) whether any such application has been made elsewhere, and (b) if made, made to which Court and by whom and with what result and so forth, and (c) where the assets are situate.—Calcutta Rules, 19, 14 and 21; Bombay Rules, 558, 559, 588; Madras Rules, 469, 469. This additional statement is necessary to help the Court to observe a comity of Courts and avoid conflict of jurisdiction between two rival tribunals. Cf. *Sarajini Dass, re.* 45 C.W.N. 757; *Forbes v. Peterson*, 1 L.R. (1941) 2 Cal. 1 = 45 C.W.N. 739 — A I R. 1941 Cal. 417 = 196 I.C. 111.

Sub.sec. (2):—In the event of an application made elsewhere, the Court may not make a grant effective throughout India.

280. [Pro. S. 66 & Suc. S. 247] The petition for probate or

Petition for probate, letters of administration shall in all cases be etc., to be signed and subscribed by the petitioner and his pleader, if verified. any, and shall be verified by the petitioner in the following manner, namely :—

"I (A. B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."

Petition to be signed and verified:—Compare the analogous provisions of O. VI, rr 14-15 of the C. P. Code Verification is necessary "to secure good faith

*Substituted by Act III of 1951, sec. 8 and Schedule, for "the States"

in the averments of the party," Hukum Chand's C. P. Code, 621. The rule of verification as contained in this section is not so drastic as that contained in O. VI, r. 16 of the C. P. Code, *Nand Kishore v. Mt. Bhagi Kurr*, A.I.R. 1958 All. 829. For penalty for false averment, *vide* sec. 282, *infra*. In the case of an application for probate, verification of an attesting witness is also necessary, *vide* sec. 281. For the effect of OMISSION to verify, see *Ram Singh v. Murtibai*, A.I.R. 1928 Nag. 41 : 68 I.C. 940,—followed in A.I.R. 1958 All. 899, *supra*. For the application of H. C. O. S. Rules 5(a) of Chapter XXXV, *Vide Re Atul Krishna Majumder*, 91 C.L.J. 224.

Administrator-General :—Is exempted from verifying, *vide* the notes and cases at p. 528, *supra*.

281. [Pro. S. 67 & Suc. S. 248] Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, *namely* :—

"I (C. D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)."

Verification by Witness :—When the application is for probate, it should be verified also by an attesting witness, *if procurable*. Cf. Tr. & Cootee, 88, 84 ; 691, 692. In this connection reference should also be made to secs. 68, 69, 70 and 71 of the Indian Evidence Act. (I of 1872). Verification by an attesting witness does not do away with the necessity of an affidavit by that witness in proof of execution of the will, if required by sec. 68 of the Evidence Act. *Re Edwin Carlow*, 56 C.W.N. 660.

Eject of want of Verification :—The provisions as to verification are *directory* and not *mandatory*; hence the omission can be cured, *Ram Singh v. Murtibai*, A.I.R. 1928 Nag. 41 : 68 I.C. 940.

When procurable :—Verification of an attesting witness is necessary only when such a witness is procurable, otherwise it will be dispensed with. But the petitioner must satisfy the Court by an affidavit or otherwise that such witness is not available. For proof of an attested document where no attesting witness is found, see sec. 69 of the Ind. Evidence Act; also *Joybchari v. Sahu Pershad*, 11 A.L.J. 400; 19 I.C. 789; *Gobardhan v. Harilal*, 85 All. 864; 11 A.L.J. 379;

19 I.C. 191. *Ol. Nibaran v. Nagendra*, 22 C.W.N. 444; *Tulsi Maheto*, 18 C.L.J. 49.

When no witness procurable.—The section does not lay down the procedure to be followed where no attesting witness is procurable. Then, verification by him will necessarily be dispensed with, *vide* under the last paragraph In *Re Bhuttomon*, 2 Law Record, 86, the attesting witness being unprocurable a certified copy of his deposition in a previous proceeding was accepted as a good substitute for verification by him. Similarly, in a proceeding for revocation the affidavit of an unprocurable attesting witness sworn eight years before, was allowed to be read as evidence of execution and testamentary capacity, *Garnall v. Mason*, 12 P.D. 142.

282 [Pro. S. 68 & Suc. S. 249] If any petition or declaration which is hereby required to be verified contains averment in petition or any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an offence under section 193 of the Indian Penal Code.

Penalty for false averment—The delinquent will be liable to punishment under sec 193 of the I.P.C. But in order to attribute criminality to him it must be shown that he had knowledge of or belief in the falsity of the averment. *Vide* also secs. 194 to 211, I.P.C.; *vide Re Bal Gangadhar Tilak*, 26 Bom., 785.

Criminal Proceeding—Under the present Cr. P. Code (as amended by Act XVIII of 1923 and Act XXVI of 1955) a criminal proceeding for an offence under this section should be started on a "complaint" under sec 476; and no sanction under section 195, Cr. P. Code, can be granted for private prosecution, *Baldeo Misser v. Deputy Inspector-General*, 51 Cal., 652.

283. [Pro. S. 69; Suc. S. 250 & D. D. A. S. 9] (1) In all Powers of District cases the District Judge or District Delegate may, if he thinks proper,—

- (a) examine the petitioner in person, upon oath;
- (b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be;
- (c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and

see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) [P. A. A. of 1903, Ss. 2(6) & 3(4)] Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself and shall certify such publication to the District Judge who issued the citation.

Powers of District Judge or Delegate :—The section lays down the powers of a Probate Court. The Court can do any of or all the things mentioned in the sub-clauses. The Court has a discretion in the matter. Note the word "may." The Court should act under this section only if it thinks proper. Where the District Delegate issues citation, and in response thereto opposition is entered, the proceeding becomes contentious and the Delegate ceases to have jurisdiction. *vide* *see*. 265 and 272, *supra*, also *Phanindra v. Nagendra*, 39 C.L.J. 569 : A.I.R. 1925 Cal., 75. Cf. *Re Hurro Lal*, 8 Cal., 570.

Methods of Proving a Will :—A will may be proved either in (1) *Common Form* or (2) *Solemn Form* or *per testes*. A will is proved in Common Form when it is presented before the Judge and the applicant tenders proof by affidavit or on oath or on the testimony of witnesses, in the absence of, and without citing, the parties interested and the Judge thereupon annexes his probate or seal thereto. In this country, common form proof generally takes place in summary or *ex parte* proceeding. Cf. *Kommollochun v. Nilruttan*, 4 Cal., 560 (1864); *Ramgopal v. Radhakrishna*, 10 C.W.N. xcv (95) : 8 C.L.J. 37n. A common form grant is possible in a contested case when the opposition is withdrawn, *Kunjallal v. Kailash Chandra*, 14 C.W.N. 1068 : 7 I.C. 740. A will is said to be proved in Solemn Form or *per testes*, when it is proved in the presence of interested parties or after citing them to come and witness the proceeding. See Bro P.P. 99, 201. Williams *On Executors*, 11th Ed., pp. 292, 238, 235; Cf. *Phanindra v. Nagendra*, 39 C.L.J. 569 ; A.I.R. 1925 Cal., 75. See also Cootes, 15th Ed. p. 964, *et seq.*; Ingpen *On Executors*, pp. 72-73.

Difference between the two Forms :—A probate in common form is revocable, whereas that in Solemn form is not so except (1) where a subsequent will is

discovered, (2) the grant is vitiated by fraud or any cogent ground. (Cf. Sec. 288, *ante*); see *Birch v. Birch*, 1902 P. 181; *Priestman v. Thomas*, 9 P.D. 70. *Kommollochun v. Nilruttan*, 4 Cal., 360 (364); *Nistariny v. Brohmomoyi*, 18 Cal. 45 (46, 47). The Judicial Committee have deprecated the introduction in this country of the English Law distinction between the above two methods of proof of will and our Courts would do well to take notice of this fact. *Ramanandi Kuer v. Kalawati Kuer*, 55 I.A. 18-7 Pat. 221-47 C.L.J. 171-82 C.W.N. 402-30 Bom. L.R. 227-26 A.L.J. 385-54 M.L.J. 281-(1928) M.W.N. 282-A I.R. 1928 P.O. 2-107 I.C. 14 (P.O.). Read also *Southern Bank Ltd v. Kesaidec*, 62 C.W.N. 444-A I.R. 1958 Cal. 877.

Court's power to compel proof in Solemn Form:—A grantee who has proved only in common form may be compelled to prove in solemn form. An executor intermeddling with the estate may be compelled to prove in solemn form. *Jackson v. Whitshed* 3 Phill., 577; but an intermeddling administrator cannot be so compelled. *Re Fell*, 2 Sw. & Tr. 126. An executor of a Hindu will made before the Hindu Wills Act is not so compellable, unless he submits to the Court's jurisdiction by asking for a grant, *Re Tiruvalier* 1 M.H.C.R. 69.

Duty of the Court:—See *Nistariny v. Brohmomoyi*, 18 Cal. 45; *Dowlat Kcer v. Rampbuldas*, 25 Cal., 459, 2 C.W.N. 177; *Re Hurrolal Shaha*, 8 Cal., 570. It is not obligatory upon the Court under this section to issue special citation in every case. *Rebells v. Rebells*, 2 O.W.N. 100; *Digambar v. Narayan*, 18 Bom. L.R. 58. The Court must be satisfied of due execution of the will, *Aamer Chand v. Mohanund Bibi*, 6 C.L.J. 453; *Woomesh Chandra v. Rashmoloni*, 21 Cal., 279; and must examine (and must not refuse to do so) all the witnesses that the parties desire to examine. *Srimati Basini v. Krishna*, 51 I.C. 1007 (Cal.); *Sajandas v. Chetiar*, A.I.R. 1955 Ajmer 88. Cf. *Nagendra v. Sart*, 51 I.O. 335 (Cal.).

Absence of Contention: Compromise:—*Vide* at p. 509, *supra*. Read also the notes under the heading "compromise" under sec. 295, *post*. Simply because the caveator refuses to answer the Judge's question, will not entitle the Judge to dispense with proof of the will, *Ravji v. Vishnu*, 9 Bom., 241. There can be no grant by consent of parties *Kamal Kumar v. Narendra*, 9 C.L.J. 19; also 14 C.W.N. 1068 *supra*. If the immediate reversioner compromises the case, the next immediate reversioner can contest the grant, *Satindra v. Sarala* 27 C.L.J. 320; 45 I.C. 59. As to executor's power of compromise by agreeing to the creation of a maintenance charge in favour of the contesting widow, *vide* 12 Pat. 359 cited at p. 509, *ante*. Read also the notes under sec. 307, under the heading, "Power of compromise".

Non-contentious Cases:—See sec. 286, *infra* and notes at p. 517, *supra*. For procedure in such cases, see *Re Shastri Charan Patuck*, 28 W.R. 103;

Soorindranath's case, 10 W.R.P.C. 85. In a non-contentious case, a *prima facie* proof of the will may do. *Re Nobadworga*, 7 C.L.R. 887. As to whether a grant can be made in uncontested cases only on the strength of an affidavit, *vide Ibid*; also *Ramgopal v. Radhakrishna*, 10 C.W.N. 207 (96) : 9 C.L.J. 27n. If the application is unopposed, it should not be "merely upon internal evidence contained in the will." [23 W.R. 108 (*supra*) ; *Bama Sundari v. Tara Sundari*, 19 Cal., 88 (P.C.) ; Cf. *Romesh v. Rajani*, 21 Cal., 1 (P.C.)], or merely on the fact that circumstances are suspicious. *Vide* under the heading, "Suspicious circumstances," *infra*. Cf also *Bulti Kunwar v. Bhagirathi*, 9 C.W.N. 649 (P.C.).

Cl. (a) : Examine petitioner in person or on Oath :—Cf. Sec. 24 of the Provincial Insolvency Act, 1920. As ancillary to his power of such examination, the Court can compel attendance of the petitioner in Court. Cf. O. xvi, r. 21 of the C.P. Code. For the administration of oath, *vide* the Ind Oaths Act (x of 1878). As to penalty for non-attendance or for refusal to take oath or to answer, see secs. 174, 178, 179, I.P.C.

Cl. (b) : Require further evidence :—As probate should not be granted unless the Court is satisfied of the proof of the will. (*Mcmachini v. Banga Chandra*, 31 Cal., 957 and 6 C.L.J. 153, *supra*), the Court can demand such further proof as it thinks proper. Necessity of further evidence becomes apparent, when the evidence adduced is conflicting and not satisfactory. Cf. 26 Cal. 459 ; 22 Cal. 824 ; and read *Pasupati Mukherji v. Sital Kumar Sarkar*, 58 Cal. 699 = A.I.R. 1931 Cal. 687 = 188 I.C. 327, but possibility of fabrication of evidence should always be excluded. For the true import of clause (1)(b), read *Indira Bai v. Venkata Sitaprasad*, I.L.R. (1953) Mad. 245 = (1953) 1 M.L.J. 234 = A.I.R. 1953 Mad. 461.

Due execution :—The petitioner is to prove that the will was duly executed. *Kuppammal v. Ammani Ammal*, 22 Mad., 245 ; *Sarada v. Gorinda*, 6 I.C. 912 ; *Amar Chand v. Mohanund Bibi*, *supra* ; *Shama Churn v. Khetramoni*, 27 Cal., 521 ; *Tyrell v. Painton*, 1894 P. 151 ; *Obhoy Churn v. Uma Churn*, 1 C.L.R. 362 ; *Bamasundari v. Tarasundari*, 19 Cal., 65 ; *Padma v. Dharmadas*, 16 C.W.N. 728 ; *Annada v. Jugutmoni*, 6 C.L.R. 176 ; *Sibosundari v. Hemangini*, 4 C.W.N. 204 ; *Tayammal v. Sashachatta*, 10 M.I.A. 429 ; *Tarachand v. Delnath*, 10 C.L.R. 660 ; *Rashmoni v. Umesh Chander*, 25 Cal., 824 : 2 C.W.N. 321. In proving the due execution of a will, all the prescribed formalities have to be proved, read the notes at p. 110, under the heading, "Execution of the Will." The attestation has also to be proved duly ; read the notes under the heading, "Two witnesses" under sec. 68(c), p. 116, *ante*. The omission to call and examine the writer of the will is not fatal where there are other witnesses to prove due execution and attestation. *Gorib Shaw v. Fotita Dasi*, 66 C.L.J. 897 = A.I.R. 1938 Cal. 290 = 176 I.C. 920. Clear evidence of due execution can be rebutted or outweighed only by cogent evidence of utter improbability of execution. *Chotey Narain v. Ratan Kjer*, 22 Cal., 519. Cf *Nitai Chand v. Nagam*,

Dassya, 10 C.L.J. 499 (following *Sibosundari's case, supra*). Clear evidence of due execution and attestation should not be whittled down by speculation about suspicious circumstances. *Celestine Sieta Bai v. Josephine*, A.I.R. 1956 Mad. 566. Shaky handwriting does not per se negative due execution. *Kameawara Rao v. Suryaprakasa Rao*, A.I.R. 1962 Andhra Pra. 178.

Belated appearance of will:—For the effect of delay in propounding a will, see *Benodini v. Bridoynath*, 22 C.W.N. 424 : 45 I.C. 187 : *Harmati Deli v. Anath Nath* 69 C.L.J. 443—A.I.R. 1939 Cal. 535—188 I.C. 758. Read also the notes under the caption "Delay", under sec 293, post; also read the notes at p 501, ante, under the heading, "Court acts as one of conscience".

Proof of Will:—The propounder is to prove a sound testamentary capacity in the testator, *Tapesh Kumar Majhi v. Birbal Majhi*, A.I.R. 1958 Cal. 698 [requisite testamentary powers to be proved]; *Gordhandas v. Bai Suraj*, 23 Bom. L.R. 1068 : 64 I.C. 257 ; *Rajendur v. Ramjowul*, 5 Lah., 263 ; A.I.R. 1924 Lah., 541 ; *Brajeswari v. Rasik Chandra*, 85 I.C. 581. Vide also the cases at pp. 82-93, ante, and to prove affirmatively that the testator knew and approved of the contents of the document, *Paul v. Thompson*, 18 Bur. L.T. 80 ; 59 I.C. 585. Vide also notes at p 97, ante. In proving a will, always the best evidence is to be given, *Ram Gopal v. Aipna Kunwar*, 49 I.A. 413 : 44 All., 495 ; 21 A.L.J. 402 ; 27 C.W.N. 485 ; A.I.R. 1922 P.C. 366 ; 69 I.C. 31 (cited at p. 93, ante). As to the standard of proof required, vide *Kesho v. Vithal*, 8 N.L.J. 123 ; 89 I.C. 468. Also at p. 98, ante. Cf. *Kuppayammal v. Ammani Ammal*, 22 Mad., 345. The standard of proof is what a prudent man should act upon, and not an absolute or conclusive one, *Jarat Kumar v. Bisveswar*, 89 Cal., 245. Evidence should be appraised on the basis of probabilities and not on the method of water tight compartment rule, A.I.R. 1966 Assam, 81. In deciding the question of validity and genuineness of a will, the Court should proceed on legal grounds established by legal testimony and not on mere suspicion, *Nathon v. Nathon*, 7 O.W.N. 373—A.I.R. 1930 Oudh, 272—128 I.C. 220. Unless a will is formally proved with reference to all the requirements of law, the Court will take no action on it. The necessity of such formal proof is not dispensed with by reason of the fact that its execution is admitted or not categorically denied or that the will is a registered one, *Tulson v. Payre Lal*, 88 P.L.R. 930—164 I.C. 778. Where the propounder takes part in the execution of the will or there are suspicious circumstances attending the execution of the will, the circumstances should be explained and suspicion removed, otherwise there could be no grant, see 1959 S.O.J. 507 ; A.I.R. 1962 S.O. 567—followed in *Sashi Kumar v. Subodh Kumar*, A.I.R. 1964 S.C. 529.

Proof of Oral Will:—The fact of the Oral will can be proved by the admission of the petitioner, although it is found in a recital in a deed requiring

registration. If the recital is required to be used to prove an oral will then it can be proved and any question of registration is irrelevant, *Bai Sita v. Bhagilal*, A.I.R. 1942 Bom., 149. Cf. 20 C.W.N. 650; 45 I.C. 188; 26 I.C. 14. In order to establish an oral will, the words spoken by the testator with every circumstance of time and place should be proved with precision and the evidence should be such as to enable the Court to be certain about what the testator had said and the testamentary effect thereof, *Hargovind Singh v. Collector of Etah*, I.L.R. (1937) All. 292=1937 A.L.J. 610=A.I.R. 1937 All. 877=169 I.C. 744; *Mahalir Prosad v. Syed Mustafa Hussain*, 41 C.W.N. 933=(1937) 2 M.L.J. 618=30 Bom. L.R. 990=1937 A.L.J. 1014=A.I.R. 1937 P.O. 174=168 I.C. 418 (P.C.). *Ramaneyacharyulu v. Narsamma*, 1933 M.W.N. 1118; *Mt. Mulia Bai v. Amru*, 95 I.C. 18. The onus of establishing an oral will is always a very heavy one and it must be proved with utmost precision and with every circumstance of time and place. *Temple of Madan Mohanji v. Krishna Kuar*, I.L.R. (1939) All. 977=1939 A.L.J. 1001=A.I.R. 1940 All. 57=186 I.C. 648; *Balakram High School, Panipat v. Nanu Mal*, 31 P.L.R. 609=A.I.R. 1930 Lah. 879; also *Ishur Fatima v. Anwar Fatima*, 1939 A.L.J. 642=A.I.R. 1939 All. 846=182 I.C. 801; *Ganesh Prasad v. Hazari Lal*, I.L.R. (1942) All. 769=1942 A.L.J. 289=A.I.R. 1942 All. 201=202 I.C. 860 (F.B.). The propriety of the terms of an oral will does not dispense with the necessity of the Court being vigilant over the matter, *Ramaneyacharyulu v. Narsamma*, 1933 M.W.N. 1118. As to the use of a *draft* as evidence of an oral will, see *Gur Prasad v. Sitla Dev*, A.I.R. 1926 Oudh 342=94 I.C. 796.

Proof of will by Pardanashin:—*Vide Isubu Lebbe v. Idrossa Lebbe*, 33 M.L.T. 437 (P.C.). Compare *Hira Bibi v. Harilal*, 29 A.L.J. 815; 49 M.L.J. 240; A.I.R. 1925 P.C. 203 (P.C.). The propounder of a will by a pardanashin lady has not got to prove independent advice as has to be done in the contractual transaction, *Rumbali Prosad v. Kishori Kuver*, A.I.R. 1937 Pat 362=169 I.C. 976. Read the notes and cases against the marginal, "Cases of Pardanashin ladies" at p. 105, ante.

Onus of Proof:—The *onus probandi* is on the propounder of a will to satisfy the conscience of the Court, that the instrument propounded by him is the last will and testament of a free and capable testator, *Rajdulari Bili v. Krishna Bibi*, A.I.R. 1926 Pat. 269=95 I.C. 1036. The propounder is to prove that the will was duly executed and subsisted at the date of the testator's death, *Jotindra Nath Roy v. Raj Lakshmi*, 57 C.L.J. 8=A.I.R. 1933 Cal., 449=145 I.C. 988; *Mt. Bhaghbhuri v. Khatun*, 80 I.C. 118. As to the case-law throwing the onus of proof on the propounder of the will, consult the following rulings: *Lai Kho Bibi v. Gopinarin*, 28 All 472; *Sukh Dev v. Kedarnath*, 6 C.W.N. 895; *Turasharan v. Debnath*, 10 C.L.R. 550; *Ajit Ch. v. Akhil Ch.*, 64 C.W.N. 576=A.I.R. 1960 Cal. 551; read also the P.C. case of *Bindeshr v. Baisakha Bibi*, 24

C.W.N. 674: 61 I.C. 481 (P.C.) and the other case cited at p. 98, *ante*; also read the P.C. case of *Ramanandi Kuer v. Kalawati Kuer*, 65 I.A. 18-7 Pat. 221-47 C.L.J. 171-32 C.W.N. 402 (P.C.), cited at p. 485, *ante*, under the heading, "Onus of Proof;" *Euscof Ahmed v. Ismail Ahmed*, A.I.R. 1938 Rang. 322-178 I.C. 165. Onus of proof varies according to circumstances. As to the onus where the preparer or writer of the will is also a beneficiary, see *Harmes v. Hinkson*, 60 C.W.N. 896-A.I.R. 1946 P.C. 156-227 I.C. 295. P.C. Cf. cases, 101-104 of the Indian Evidence Act (1 of 1872); *Symes v. Green*, 1 Sw. & Tr. 401, *Burdett v. Thompson*, 3 P. & M. 72; *Smee v. Smee*, 5 P.D. 84. Where a party attacks a will on the ground of *undue influence*, the onus is on the party so attacking. *Raja Raje-wara v. Kuppuswamy*, (1921) M.W.N. 722: 41 M.L.J. 474: 68 I.C. 352, (*vids* at p. 106.). The burden of proving the existence of disposing mind is on the applicant who applies for probate, *Nika Ram v. Mangu Ram*, A.I.R. 1934 Lah. 682-154 I.C. 1014; *Teluram v. Badrinath*, A.I.R. 1927 Lah. 609-100 I.C. 162. This burden is not lightened by the fact that the propounder is a stranger to the family, *Kedar Nath v. Raj Kumar*, 69 C.L.J. 894-A.I.R. 1939 Cal., 674-188 I.C. 17. It becomes a heavy one by reason of non-registration of the will and the delay in propounding it, *Harimati Debi v. Anath Nath*, 69 C.L.J. 443-A.I.R. 1939 Cal. 535-183 I.C. 758. If a caveator impugns a will on the ground that it was obtained by undue influence, excessive pursuasion or moral coercion, the onus lies on him to establish the fact, *Kanga v. Kanga*, 29 C.W.N. 45-2 A.L.J. 98-26 Bom. L.R. 579-A.I.R. 1924 P.C. 28-80 I.C. 777 (P.C.); *Kamala Debi v. Kishorilal*, A.I.R. 1962 Punj. 196. If the initiatory proceeding of the caveator prior to the grant, failed for absence of interest, that will be *res judicata* for the purpose of that caveator's revocation proceeding, *Pradip K. Sarkar v. Umasani Bose*, A.I.R. 1959 Cal. 277.

The mere fact that the provision of the will is unjust to the testator's wife and children does not rebut the proof of execution of the will, *Bai Menghibai v. Praggi Dayal*, 30 C.W.N. 462-A.I.R. 1925 P.C. 198 (P.C.). No inference for or against the genuineness of a will can possibly be drawn from difference in the quality of the ink, especially when the will is a long document, *Gayeshwar Piasad Bhagwati Kuer*, A.I.R. 1933 Pat. 612-148 I.C. 5.

There is a heavy onus on the propounder where the genuineness of the will and the testamentary capacity of the testator are both challenged, *Tatai Dhorain v. Digam Dhora*, A.I.R. 1960 Pat. 318. The onus of proving the invalidity of a will is on the person attacking that document, *Hira v. Shah Din*, 29 Punj. L.R. 217-109 I.C. 640. There is no hard and fast rule as to what quantum of evidence is necessary to establish a will. The Court can always insist on sufficient proof to satisfy its conscience. [Cf. 1960 M.P.L.J. 746]. There is nothing wrong in a Court vacillating even after having made up its mind once, and directing re-hearing of the case and calling for further

evidence, *Pasupati Mukherji v. Sital Kumar Sarkar*, 58 Cal. 699 = A.I.R. 1931 Cal. 587 = 193 I.C. 327. As to the quantum of evidence to prove the execution of a will, see *Ram Gopal v. Aipna Kunwar*, 49 I.A. 413 = 44 All. 496 = 27 C.W.N. 486 (P.C.) and the other cases cited at p. 110, ante, under the heading, "Execution of the will." Also *Surendra Nath v. Jahnavi Charan*, 56 Cal. 390 = A.I.R. 1929 Cal. 484 = 119 I.C. 17; *Ramesh Chandra v. Lakhman Chowdury*, A.I.R. 1961 Cal. 518. Where the execution of a will has been substantially proved, that proof will not be discredited by slight discrepancies in the testimony of witnesses, *Nigendra Chandra Sen v. Mohendrahari Nag*, 34 C.W.N. 988 = A.I.R. 1931 Cal. 96 = 129 I.C. 851, or by the fact of disinherition of near relations or of the unjustice of the terms of the will, *Shyam Sundari v. Kamal Kumari*, 57 C.L. 7. 246 = A.I.R. 1933 Cal. 769. The onus that lies on the propounder is generally discharged by proof of the capacity of the testator and the fact of execution from which the testator's knowledge of and assent to the contents of the will may be assumed. On this general rule an exception has been engrafted as a rule of great prudence. That is, in the case of a person writing, preparing or procuring a will and taking a benefit thereunder, *Rajdulari Bibi v. Krishna Bili*, A.I.R. 1926 Pat. 269 = 95 I.C. 1036; *Barry v. Butlins*, (1838) 2 Moo. C.P. 480; *Tyrell v. Painton*, (1894) P. 151 (157, 159); *Onus probandi* where read also *Mallappa v. Tipava*, 32 Bom. L.R. 1289 = A.I.R. 1930 Bom. 589, cited at p. 106, ante. Where a person propounding a will takes a benefit under it, the Court will regard

the case with a certain amount of suspicion and demand very strict and clear proof, as to the genuineness of the will and of the disposing mind of the testator, *Sooramma v. Yarabati Varahalu*, A.I.R. 1927 Mad. 708 = 101 I.C. 826; *Jotindra Nath Roy Chowdhury v. Raj Lakshmi Debi*, 57 C.L.J. 8 = A.I.R. 1933 Cal. 449 = 145 I.C. 838; *Panduraay Shamrao v. Dwarkadas Kalliandas*, 35 Bom. L.R. 700 = A.I.R. 1933 Bom. 942 = 146 I.C. 621; *Harmes v. Hinkson*, 50 C.W.N. 895, P.C., *supra*; *Patai Dhorain v. Digam Dhora*, A.I.R. 1960 Pat. 818; *Ramesh Chandra v. Lakhman Chandra*, A.I.R. 1961 Cal. 518; *Kameswar Rao v. Surja Prakasa Rao*, A.I.R. 1962 Andhra Pra. 178; *Kamala Devi v. Kishore Lal*, A.I.R. 1962 Punj. 196; read also the notes under the heading, "Suspicious circumstances", post. If a party writes a will and takes a benefit under it, the Courts will be on their guard and be more vigilant in examining the evidence as to the genuineness of the will and the testator's approval of its contents, *Vinayak Narayan v. Sakharam Luxman*, A.I.R. 1927 Nag. 264 = 102 I.C. 635; *Rangayya v. Seshappa*, 51 Bom. 26 = 29 Bom. L.R. 327 = A.I.R. 1927 Bom. 228 = 101 I.C. 416 — relying on *Barry v. Butlin*, *supra*; *Sudhir Chandra v. Uttara Sundari*, 87 C.W.N. 435 = A.I.R. 1933 Cal. 571 = 145 I.C. 684. The above rule will apply even if the benefit which the propounder takes under the will is not of a substantial character or of a pecuniary nature. It will apply even when a person enjoying the confidence of the testator is appointed a manager of his estate for a salary, see *Surat Kumari Bibi v. Rai Sahki Chand*, 66 I.A. 62 = 8 Pat. 382 = 33 C.W.N. 474 = 66 M.L.J. 180 = 81 Bom. L.R. 270 = 27 A.L.J. 187 = A.I.R. 1929 P.C. 45 = 113 I.C. 471 (I.C.) —

reversing (on this point) *Rajdulari Bibi v. Krishna Bibi*, A.I.R. 1926 Pat. 269 = 95 I.C. 1036, *supra*. For other cases on the point, see *Eusoof Ahmed v. Ismail Ahmed*, A.I.R. 1988 Rang. 322 = 178 I.C. 165; *Jalaidin v. Aminuddin*, 29 S.L.R. 366; *Kameswara Rao v. Suryaprakas Rao*, A.I.R. 1962 Andhra Pra. 178 — relying on A.I.R. 1980 P.C. 24.

For the burden of proof of an unregistered will thirty years old and produced thirty one years after execution, read *Rajani Kanta v. Uma Sundari*, F.A. No. 196 of 1951, decided by R.P. Mookherji and Renupada Mukherji JJ. on 5th August 1952; also read the notes under the next heading.

As to proof of a holograph will, read *Santasilu Das v. Narendra Nath Pal*, 56 Cal 55 = A.I.R. 1929 Cal. 290 = 121 I.C. 570. Shaky handwriting may not necessarily rouse any suspicion about the genuineness of will, *Kameswara Rao v. Suryaprakas Rao*, A.I.R. 1962 Andhra Pra. 178.

Execution of a will and of the deed of authority to adopt on the same Day is a quite possible matter, *Manindra Chandra v. Mahalaxmi Bank Ltd.* 49 C.W.N. 481 = A.I.R. 1945 P.C. 105. As to how cases of *undue influence, importunity* have to be dealt with, *vide Kamala Devi v. Kishori Lal* A.I.R. 1962 Punj 196.

Thirty years old will:—The rule of presumption enacted in sec. 90 of the Evidence Act to the effect that a will more than thirty years old may be read in evidence without formal proof is inapplicable in a probate proceed. *Shyam Lal Ghose v. Rameswari Baru*, 29 C.L.J. 82. The contrary view taken in *Mahendra Nath v. Netas Chiran*, I.L.R. (1948) 1 Cal. 392 = 47 C.W.N. 369 and *Sarat Chandra v. Panchanan*, I.L.R. (1953) 1 Cal. 55 = A.I.R. 1953 Cal. 471, proceeding from ill appreciation of the law cannot be regarded as sound law. The cases of *Dos Dem Oldham v. Walby* (1828) 8 B. & C. 22; *Gobinda Chandra v. Pulin Behari*, 31 C.W.N. 215 (218); *Munna Lal v. Msmt. Kasibai*, 73 I.A. 222 = 51 C.W.N. 175, P.C., all being concerned with the position of ordinary Civil Court, are ineffective to impair the authority of 29 C.L.J. 82. Read in this connection the criticism appearing in IV Legal Miscellany, p. 182.

Rival will set up after a previous grant: Procedure:—If, after a grant has already been made in favour of somebody, a person wants to propound a subsequent will, the proper procedure for him will be to apply for probate of that will and to pray for revocation of the grant already made and to such a proceeding the ordinary rules applicable to the High Court or the District Court, as the case may be, will be attracted, *In re Jagannath*, 48 C.W.N. 843. As to the procedure to be followed where the rival will is set up during the pendency of an early proceeding for grant, see *Usharani Roy v. Hemlata Roy*, I.L.R. (1946) 1 Cal. 196 = 49 C.W.N. 823; the proper procedure would be to file a separate application

for probate and to amalgamate the two) *Venidas Nemchand v. Bai Champabai*, 58 Bom. 829 = 31 Bom. L.R. 1014. The amalgamation of the two proceedings for two rival wills may not be possible where the latter will is alleged to have been revoked by the testator, *Usharani v. Hemlata Roy* *supra*.

The question of legality of will is a mixed question of law and fact:—
See *Mahomed Ata Husain v. Husain Ali*, 1944 O.W.N. 37 = A.I.R. 1944 Oudh, 189.

Presumption of due Execution:—Where a will is shown to be properly executed and there is a proper attestation clause, a presumption of due execution will arise and such presumption will not be defeated by failure of memory on the part of an attesting witness, *Woodhouse v. Balfour*, 18 P.D. 2; *Dayman v. Dayman*, 71 L.T. 699; *Vinnicombe v. Butler*, 3 Sw. & Tr. 580; *Harter v. Harter*, 3 P. & D. 11; *Re Piperett*, 1902 P. 207; *Symes v. Green*, *supra*. Under the Indian law also a will must be presumed to have been duly executed although the recollection of the witnesses is vague, *Mahoney v. Georgiana Dominick*, A.I.R. 1927 All 388 = 100 I.C. 675. A presumption of due execution may arise even in absence of a regular attestation clause, *Nitai Chand v. Nagani Dassya*, 10 C.L.J. 499. There will be no presumption of due execution hereunder if the attendant circumstance throw doubt on the genuineness of the will; *Tapesh Kumar Majhi v. Birbal Majhi*, A.I.R. 1958 Cal. 698.

Scope of Enquiry:—The scope of the enquiry hereunder is limited to the questions of genuineness of the will, its execution, valid attestation and testamentary capacity etc. of the testator. There is no necessity of any enquiry about the title to the property, *Thakur Madha Singh v. Jagadambalal*, 1 L.R. (1960) 10 Raj. 406 = A.I.R. 1960 Raj 237; A.I.R. 1960 Madh. Pra. 255. The Court should not go into the question of the testator's disposing power, *Cullen v. Mrs. Elkins*, 9 N.L.R. 152 : 21 I.C. 699; nor into the question of application, *Mahasundar v. Ramratan*, 1 Pat. L.W. 870; 35 I.O. 416. This is so, because in practice, the Practice of the Probate Probate Court is not a Court of construction and its function Court.

is generally speaking, confined to the work of construing testamentary documents only in so far as it is necessary to decide that testamentary documents should be admitted to probate or to see which person, if any at all, is entitled to administration, *Nand Kishore Lal v. Pasupati Nath*, 7 Pat. 896 = A.I.R. 1928 Pat. 348 = 108 I.O. 328. *Vide* under the heading "Question of title" at pp. 408 and 419, ante. Cf. *Nirode Barani v. Chamat Karini*, 19 C.W.N. 205 : 27 I.C. 617; *Sarada v. Triguna*, (1918) Pat. 349 ; 3 Pat. L.J. 416 ; 46 I.O. 117; *Nishikant v. Ashutosh*, 17 C.W.N. 613 ; 28 I.C. 296.

Suspicious circumstances:—Where there are circumstances which excite suspicion as to the genuineness of the will, the petitioner is bound to remove such suspicion by evidence, *Paul v. Thompson*, 18 Bur. L.T. 80. 59 I.C. 695;

Hornes v. Hinkson, 60 C.W.N. 695-A.I.R. 1946 P.C. 156-297 I.C. 295, P.C. *Pandurang Shamrao v. Dwarkadas Kaliandas*, 36 Bom. L.R. 700-A.I.R. 1939 Bom. 349-146 I.C. 621; *Hors Lal v. Rai Sali*, I.L.R. (1949) AH. 776; *Sarajini v. Haridas*, 34 C.L.J. 373; 96 C.W.N. 113; A.I.R. 1922 Cal., 12 : t6 I.O. 774. In all cases of suspicion hanging about a will, the Court may insist on a very strict standard of proof, *Jnanada Govinda v. Birendra Nath*, 69 C.L.J. 847-A.I.R. 1939 Cal. 595-186 I.O. 684. For suspicion to warrant an attack on the genuineness of the will, it must be inherent in the transaction itself, and must not arise from mere conflict of testimony, *Kristo Gopal v. Bairya Nath*, I.L.R. (1939) 2 Cal. 178-A.I.R. 1939 Cal. 87-181 I.O. 8. Head Lord Buckmaster's observations in 49 I.A. 418-44 All. 496-A.I.R. 1922 P.C. 866 and those of *Sir Binod and Madhavan Nair*, respectively in 67 I.A. 96-61 C.L.J. 160-34 C.W.N. 206, P.C. and A.I.R. 1949 P.C. 272-(1949) 2 M.L.J. 469, P.C. When Unnatural will. the terms of a will are inofficious or unnatural, such suspicion may naturally arise. Cf. *Prasannamoyi v. Beikuntha*, 49 Cal. 132 : 25 C.W.N. 779; 34 C.L.J. 884; 66 I.O. 782 (on appeal to P.C., 27 C.W.N. 797; 44 M.L.J. 699; 72 I.C. 286); *Kristochurn v. Dwarkanath*, 10 W.R. 32; *Annada v. Jagatmohini*, 6 C.L.R. 178; *Sarada v. Muddun*, 94 W.R. 162; also 19 Cal., 68 (P.C.); 9 C.W.N. 649 (P.C.), 89 Cal., 245, *supra*. Thus, where a will does not mention the wife and children of the testator, and it is not probated for 20 years after the testator's death the Court refused probate as the circumstances were suspicious, *Rosa Maria v. Tacob Souza*, (1928) M.W.N. 647 : 18 L.W. 688. But if the will is natural and is acted upon, delay of 25 years for a controversy to arise is of no account, *Thakur Chandrika v. Madho Singh*, 40 C.L.J. 466 : 20 L.W. 699 : A.I.R. 1924 P.C. 231, (P.C.); *Benedine v. Bridoy*, 92 C.W.N. 424 : 45 I.O. 187. A natural proper and reasonable will will not require that rigid standard of proof which is necessary in a doubtful case, *Keshoram v. Pann Lal*, 40 P.L.R. 4. A will may be upheld on due proof of execution notwithstanding the fact that injustice has been done by the testator on his wife and children, *Bai Monghabai v. Pragji Dayal*, 30 C.W.N. 462-A.I.R. 1926 P.C. 198-89 I.O. 88, P.C. Cf. *Makunda v. Bholanath*, (1917) Pat. 85; 43 I.C. 195. That is direct and positive evidence of execution may overbalance the unnatural character of the will, *Jitendra Nath Roychoudhury v. Lakshmi Devi*, 67 C.L.J. 8-A.I.R. 1938 Cal. 449-146 I.O. 882. A will is not unnatural simply because it disinherits the reversionary heirs, *Gayashwar Prasad v. Bhigwate Kuer*, A.I.R. 1938 Pat. 612-148 I.O. 5. The mere fact that the provision of the will is unjust to the testator's wife and children does not rebut the proof of execution, *Bai Monghabai v. Pragji Dayal*, 30 C.W.N. 462-A.I.R. 1926 P.C. 198 (P.C.), *supra*. Non-registration of the will per se does not make it suspicious, *Kristo Gopal v. Bairyanath*, I.L.R. (1939) 2 Cal., 178-A.I.R. 1939 Cal., 87-181 I.O. 8, *supra*. Where a prior registered will is alleged to have been revoked by a subsequent unregistered will, non-registration may give rise to a suspicion, *Abdul Bari v. Nasir Ahmed*, 10 C.W.N. 201-A.I.R. 1938 Oudh, 142-160 I.O.

330. Where the subsequent disposition runs counter to the disposition admitted to have been made in a previous will and the testator is shown to have been very much advanced in years and feeble in body at the material time, the burden becomes heavier on the propounder to remove the suspicion attaching to the circumstances of the case, *Arthur Albert Unger v. Maud Martin*, 1288 A.L.J. 97 - A.I.R. 1938 All. 201-174 I.C. 882. The suspicion aroused by the astounding innovations made in the subsequent will or by its remarkable departure from its predecessor will not be quelled by the mere fact that the subsequent will was registered, *Sadachi Ammal v. Rajathi Ammal*, 1939 M.W.N. 651 - A.I.R. 1940 Mad. 315. The suspicion in such a case will be accentuated by non-examination of witnesses who should have been examined, *Ibid.* A will procured by a party who is benefited by it may raise a suspicion and require the Court to be more vigilant and jealous over it and to call for a higher standard of satisfactory evidence; if the suspicion is removed, the will may be a perfectly valid one, *Jotindra Nath Roychoudhury v. Raj Luzmi Devi*, 57 C.L.J. 8 - A.I.R. 1939 Cal. 449 - 145 I.C. 998; in such a case, if the suspicion is not removed, it will be improper to pronounce in favour of the will, *Walter Smith v. Donald Smith*, A.I.R. 1933 Sind. 262 - 147 I.C. 404. Delay in applying for probate may constitute a suspicious circumstance but if it is properly explained away, it won't do so, *Gayeswar Prasand v. Bhagwati Kuer*, A.I.R. 1938 Pat. 612 - 148 I.C. 5.

C1. (c) Persons claiming to have interest:—Citation is to be issued only upon persons who claim to have some interest in the estate. *Southern Bank Ltd. v. Kasardeo*, 62 C.W.N. 444 - A.I.R. 1958 Col. 377. Such persons will be those who will have *locus standi* to apply for revocation under sec. 268, *supra*. So, *videlicet* the cases cited under the headings, "Locus Standi," and "Who have Locus Standi" at pp. 490-492, *ante*. The person must claim such interest as will entitle him to enter caveat in a probate proceeding and to contest a will, *Hingeston v. Tucker*, 2 Sw. & Tr. 596; *Haripada Shaha v. Ghanesham Shaha*, 49 C.W.N. 718 or to sue for recovery of the property, *Re Bhobo Sundari*, 6 Cal., 460 (464) or as will entitle him to obtain letters of administration himself, *Debendra v. Surendra*, 5 P.L.J. 107 (116), *supra*, and at p. 492, *ante*. Read also *Mulukadhari v. Prem Debi*, A.I.R. 1959 Pat. 570 and the other Patna cases, cited there. Cf. 84 Bom. 459 : 12 Bom. L.R. 966; 7 P.R. 1902; 17 Cal. 48; 20 I.C. 342 (Cal.), all cited at p. 493, *ante*. Even a slight interest may do, see p. 492, *ante*; *Kipping v. Ash*, 1 Robert, 270; *Hemangini v. Haridas*, (1918) Pat. 276 : 3 Pat. L.J. 409 : 46 I.C. 898. Even the possibility of an interest is sufficient to entitle a party to oppose the grant of a probate. If the interest is such as is or is likely to be prejudicially or adversely affected by the grant that will sufficiently qualify a person for the purpose of citation hereunder, *Nabin Chandra Gwaha v. Nibaran Ghadra*, 69 Cal. 1908 - 36 C.W.N. 685 - A.I.R. 1939 Cal. 734 - 140 I.C. 54. A person who is entitled to any portion of the estate left by the deceased or a right to claim to maintenance from that estate has sufficient interest to enter

a caveat and oppose the grant of probate. In order to be entitled to oppose the grant it is not necessary that a person should claim through the testator, *Hanumantha Rao v. Latchamma*, 49 Mad 960-51 M.L.J. 588-1926 M.W.N. 785-24 L.W. 502-A.I.R. 1926 Mad 1193-98 I.C. 269. As to what persons can be said to have interest within the meaning of this section, read the cases cited above. One broad test may thus be laid down for the purpose; if a man stands to lose by the grant of probate he will be person interested; on the other hand if the proposed grant does not prejudice him in any way, he is not a person interested. Read *Sowbagimal v. Komalangi Ammal*, 54 M.L.J. 382-A.I.R. 1928 Mad. 803-109 I.C. 420; also the notes at p. 552, *post*. Consequently, a person who claims outside and independently of the will or claims adversely to the testator or disputes his power of disposition he is not a person claiming an interest in the estate within the meaning of the section and is not entitled to oppose the grant. *Kashinath Singh v. Gulzari Kuer*, A.I.R 1941 Pat. 475-198 I.C. 856; also 1 C.L.J. 268; 20 I.C. 342, cited at p. 498, *ante*; 67 C.W.N. 716. Likewise, a person claiming the estate by virtue of survivorship is not entitled to citation under this section, *Kalajit v. Parmeshwar*, 1 Pat L.W. 308: 39 I.C. 573 (Pat.). Read also *Koma'angi Ammal v. Sowbhagi Ammal*, 54 Mad. 24 and the other cases at p. 491, *ante*. Other instances of such persons are (1) Attaching mortgages decreeholder, 10 Cal. 413; (2) A reversioner, *vide* the cases at p. 498, *ante*. (3) A previous grantees of probate or administration, *Babla v Chisman*, 1 Philkim 160 (note) (e); *Boston v Foz*, 4 Sw. & Tr. 199; *Re Taramoni*, 25 Cal., 553; 17 Mad. 378; 22 C.W.N. 664: 45 I.C. 760; *Re Shapoorji Framji*, 5 C.W.N. exlvii; (4) A judgment-creditor alleging that the will was set up to defraud creditors, *Kishendas v. Satyendra Nath*, 28 Cal. 441; *Umanath v. Nilmoney*, 6 Cal. 420; *Arikal v Narayan*, 34 Mad. 405; (cited at p. 492, *ante*). A person claiming to be joint with the testator and impugning the latter's power of disposition over the estate which is claimed as joint family property has no *locus standi* to object to the grant, even though citation has been served on him to appear, *Ramyad Mahton v. Rambhajeet Mahton*, 10 Pat. 812-A.I.R. 1932 Pat. 89-185 I.C. 108. A person disclaiming interest or claiming title paramount is not entitled to citation as he has no *locus standi* to oppose grant, *Mahant Ram v. Premdas*, 10 Pat. 817-A.I.R. 1932 Pat. 95-186 I.C. 296: *Janki Saran v. Rambahadur*, A.I.R. 1932 Pat. 848-140 I.C. 729. The prospective cited person must show that he claims interest in the deceased's estate, *vis a vis* the testator and not *via* any other intermediary or through any other channel, *R. Santhina Mudaly v. Saradam Bai*, A.I.R. 1955 Mad. 576 (not approving 52 M.L.J. 814). The question whether the objector had no subsisting interest in the deceased's estate is a question of fact and cannot be agitated for the first time before the appellate Court, *Sajandas v. Chetan*, A.I.R. 1965 Ajmer, 88. A Debtor of a deceased person cannot by merely contracting a loan from the deceased become interested in his estate so as to be entitled to object to the grant under this cl. (e). *Santosh Kumar v. Jalad Sashi*, A.I.R. 1941 Pat. 18-190.

I.C. 36. For the position of a creditor, *vide Purrows v. Griffiths*, 1 Cas Tem. Lec. 544; *Meuzies v. Pulbrook*, 2 Curt. 845; also 7 Bur. L.J. 245: 25 I.C. 48; *Dabbs v. Chisman*. *supra*. According to the Patna Court a simple creditor of the testator's estate is not a person having an interest in that estate, and has therefore, no right to object to the granting of probate of the will of the testator, *Re Elsie Augusta Black*, A.I.R. 1941 Pat. 151-190 I.C. 362. It should always be remembered that if a person is likely to be affected by the deflection of the estate in consequence of the will, he may be said to have sufficient interest in the estate for the purposes of the clause. If there is no question of any deflection of the estate to his prejudice, evidently he will have no right to intervene in the probate proceeding. Read also *R. S. Sinha v. Salena Heater*, 20 Pat. 75. Practically speaking it is of no great concern to a creditor of the testator whether he gets his dues from the executor or an administrator or from an heir; and therefore he will have no right to contest the grant, *Sewlagi Ammal v. Kcmalangi Ammal*, 54 M.L.J. 882=A.I.R. 1928 Mad. 803-107 I.C. 420. For the creditor of the heir-at-law, *vide* at p. 492, *ante*; *Dinabandhu Roy v. Sarala Sundari*, I.L.R. (1940) 1 Cal. 33-71 C.L.J. 25-41 C.W.N. 149=A.I.R. 1940 Cal. 296-188 I.C. 787; *Arakal v. Narayana*, 84 Mad 405; *supra*. If the heir-at-law is deprived of the estate by the will, the interest of his creditor will undoubtedly be in peril, and such creditor will have the right to oppose the grant, *Dinabandhu Roy v. Sarala Sundari*, *supra*. The execution purchaser of the interest of the testator's son can object to the grant of letters of administration, *Chandra'ara Devi v. Srish Chandra Bhattacharjee*, A.I.R. 1928 Cal. 277. A creditor who acquires an interest in the estate of the deceased after the latter's death by purchasing, or taking a mortgage of, a part of the estate is only entitled to a general citation hereunder and not to any special citation, *Gopesh Chandra v. Sylhet Loan Co.*, 41 C.W.N. 120. For other instances of persons who stand outside the clause, read *Pares Chandra v. Bidubhusan*, I.L.R. (1955) 1 Cal. 439. For the sister of the deceased, *vide* *Sharkie v. Terry*, 78 P.W.R. 1912: 70 P.L.R. 1912: 13 I.C. 489.

Citation:—As to what is citation see p. 487, *ante*. For the Right to citation, read *Southern Bank Ltd v Keardao*, 62 C.W.N. 444=A.I.R. 1958 Cal. 377. Citations are either general or special. A citation is general when it calls upon all persons (without naming them individually) claiming interest in the deceased's estate to appear to witness the probate proceedings and to contest them if they so choose. It is special when it is addressed to a particular individual, see *Kamona Soondery v. Hurrolal*, 8 Cal. 570 (575). Cf. *Newell v. Weeks*, 2 Phill. 224; *Lister v. Smith*, 3 Sw. & Tr. 69. The citation contemplated by this section is general citation (i.e. on all persons), and should be served in the manner laid down in sub-sec. (2). The object of citation is that all persons whose interests are or may be adversely affected by the grant shall have notice of the proceedings and an opportunity of intervening for

Object of citation.

the protection of their interests. Read *Radhashyam v. Ranga Sundari*, 24 C.W.N. 541. Cf. *Dwijendra v. Golok*, 21 C.L.J. 287; 19 C.W.N. 747; *Akhileswari v. Haricharan*, 4C O.L.J. 297. Vide Calcutta Rules, 9, 10, 11 and 18; Madras Rules, 276-461; Bombay Rules, 585-86; *Nistarini v. Brohmomoyi*. 18 Cal., 45; *Re Petambar Girdhar*, 5 Bom., 638; *Sarada Kanta v. Gobind* 12 O.L.J. 91; *Kunjala v. Kailash*, 14 C.W.N. 1068. Citation makes the grant *per testes*, *vide, supra*. The judge has always a discretion to issue citation on persons whose interests are likely to be affected by a grant, *Re Hurrolal*, 8 Cal., 570; The section simply gives the Court an option; so, it is not obligatory upon him to issue a special citation, *Rebels v. Rebels*, 2 C.W.N. 100. But where the grant is fraught with grave consequences, as for instance where the will alters the course of devolution of property, it is but just that citation should be issued, *Shyama Charan v. Profulla*, 19 C.W.N. 883; 21 C.L.J. 557. Different considerations arise when the testator is a Hindu and when he is a Christian, and therefore, the Court will have power to dispense with special citation in the case of a Christian even if in the corresponding circumstances of a Hindu testator, such citation is deemed necessary. *S. R. Water Smith v. F. H. Donald Smith*. A.I.R. 1939 Sind, 262=147 I.C. 404. Citation should be issued to an interested party, *Emberley v. Trevanion*, 4 Sw. & Tr. 197. A person not otherwise interested in the deceased's estate does not become entitled to oppose the grant simply because citation has been issued to him, *Re Hurrydas*, 4 Cal., 87; *Debendar v. Surendra*, 5 P.L.J. 107 (116). Mere issue of citation on a person does not qualify or entitle him to present opposition to a grant, if he is otherwise incompetent to do so; also *Ramynd Mahton v. Rambhaju Mahton*, 10 Pat. 812=A.I.R. 1932 Pat. 89=185 I.C. 108. Where general citations have been issued, it is not necessary that citation should issue specifically to one of the executors to enable him to join in the application for probate, *Hotchand v. Navalrai*, A.I.R. 1930 Sind, 91=121 I.C. 173. In the matter of citation, there is a distinction between cases of wills and cases of intestacy, because in the former cases the proof of the will without impleading necessary parties affects prejudicially the rights of those who would inherit, whereas in the latter, the omission to issue citations only affects the preferential rights of the excluded persons to administer or their rights to object to the personnel of the administrators, *Ramya Gaorangini v. Betty Mahbert*, 31 C.W.N. 160=A.I.R. 1927 Cal. 207=100 I.C. 177.

Citation should be properly and effectively served, that is to say, so served as would give to the person, whose interests are, or may be, adversely affected, an opportunity either to oppose the grant of probate or to require the will to be proved in his presence, *Ramanandi Kuer v. Kalwati Kuer*, 55 I.A. 18=7 Pat. 221=47 C.L.J. 171=32 C.W.N. 402=54 M.L.J. 281=1928 M.W.N. 282=30 Bom. L.R. 227=26 A.L.J. 385=5 O.W.N. 96=A.I.R. 1928 P.C. 2=107 I.C. 14 Absentees not bound by (P.C.). Persons not parties to the probate proceedings the Probate Proceeding, are not bound by the order made therein, *Chott Mahton v.*

Lachmi Kuer, A.I.R. 90 Pat. 854.

For the form of citation. *vide Appendix.*

Citation where the interested person is a minor:—According to some of the comparatively earlier cases, where the person to be cited was a minor, a guardian *ad litem* had to be appointed. *Vide* the cases at p. 511, *supra*, and a citation had to be issued on such a guardian, *Re Amrita Lal*, 27 Cal. 350. Cf. *Rebells v. Febeles*, *supra*. The object of citation was not fulfilled if no guardian *ad litem* was appointed for a minor opposite party, see *Dwijendra v. Golak*, 21 C.L.J. 287 : 19 C.W.N. 747 ; 28 I.C. 574 ; *Akhileswari v. Hari Charan*, 40 C.L.J. 297. See also *Radhushyam v. Ranga Sundari*, 24 C.W.N. 541 : 59 I.C. 664 ; *Sachindra v. Heromoyee*, 24 C.W.N. 538 : 69 I.C. 495. Cf. also 12 C.W.N. 6 and 10 C.L.J. 268 : 28 C.L.J. 79 : 22 C.W.N. 564. But it has been recently opined that in proceedings for letters of administration, if notice is issued on the proposed guardian, the minor may be regarded as effectively represented in the proceeding even if no formal order is made appointing the guardian, *Ranmaya Gacrangini v. Betty Mahbart*, 31 C.W.N. 160 — A.I.R. 1927 Cal. 207 — 100 I.C. 177. From a comparative study of the case law, it appears that the present judicial tendency is to relax the old rigidity about the question of the formal appointment of a guardian *ad litem* and the reason for this relaxation is that the Civil Pro. Code has no full operation till a proceeding under this Act reaches its contentious stage, and becomes suit. It has been thought that if the natural guardian is there to protect the interest of the minor, absence of formal order of appointment will not entail any mischievous consequence. It is only where the natural guardian himself is the propounder or is the propounder's man or proteges, the question of jealously safe-guarding the minor's interest arises, and the Court should insist on a formal order of appointment of a guardian *ad litem*, on pain of invalidation of the whole proceeding. *Haimabari Mitra v. Kunja Mohan Das*, 35 C.W.N. 337 — A.I.R. 1931 Cal., 718 — 195 I.C. 282. Non-appearance of the natural guardian to contest the grant inspite of citation does not render the appointment of a guardian *ad litem* obligatory, *Ibid*. The following pronouncement of the Judicial Committee may now be regarded as the final word on the subject. Where a will of which probate is sought affects the interests of a minor, the prudent course is for the propounder to take steps to have the will proved *per testes* (i.e. in solemn form) in the presence of an independent guardian *ad litem* of the minor, *Ramanandi Kuer v. Kalawati Kuer*, 65 I.A. 18 — 7 Pat. 221 — 47 C.L.J. 171 — 32 C.W.N. 402 — 54 M.L.J. 261 — (1928) M.W.N. 242 — 30 Bom. L.R. 227 — 26 A.L.J. 386 — 5 O.W.N. 96 — A.I.R. 1928 P.O. 2 — 107 I.C. 14 (P.C.).

Sub-Secs (2) and (3); Issue and Publication of citation:—Under sub-sec. (2), the Citation should be posted in some conspicuous place of the Court-house and in the office of the Collector of the district, and should be issued or published in some

suitable manner Citation may be issued under a registered cover with acknowledgment due, *Re Nicholson*, 1903 A.W.N. 81. It may be published by advertisement in the papers, *Tr. & Coote*, 247; see at p. 437, ante. Costs of advertisement should be borne by the petitioner, *Re Shrivell*, 1903 A.W.N. 80. Under sub-sec (3), if some part of the assets be in a district of another State, then notices should be forwarded to the District Judge of that place for publication. Service of notice upon the female pardanashin guardian of a minor who is living under the protection of the propounder by throwing the same into the verandah of the room of the lady is scarcely of any better effect than service on the minor of tender years himself, *Haimalati Mitra v. Kunja Mohan Das*, 85 C.W.N. 387, *supra*.

Effect of absence of citation:—Citation under this section being only discretionary, mere absence of such citation does not invalidate the grant, *Digambara v. Narayan*, 13 Bom. L.R. 38 : 9 I.C. 364. *Vide* at p. 487, ante. Read also *George Anthony Harris v. Millicent Spencer*, 85 Bom. L.R. 708 = A.I.R. 1933 Bom. 970 = 149 I.O. 261. Omission to cite members of testator's family, is not fatal to the proceedings, *Sarat Chandra v. Panchanan*, A.I.R. 1968 Cal. 471.

284. [Pro. S. 70 ; Suc. S. 251 & D. D. A. S. 5] (1) Caveats against the grant of probate or administration of probate or administration may be lodged with the District Judge or a District Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

(4) [Pro. S. 71 & Suc. S. 252] The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V.

Caveat:—As to what is a *Caveat* see *Chotalal v. Bai Kabubai*, 22 Bom. 261. A *Caveat* is a warning or caution in writing entered in the Court of probate to stop probates and administrations, from being granted without the knowledge of the party that enters it in view of an apprehended dispute, *vide* *Williams on Executors*, 11th Ed. p. 464. "A *caveat* is a notice in writing lodged

in the principal probate registry, or in the probate registry where the deceased resided or had his fixed place of abode at the time of his death, that nothing is to be done in reference to the estate of the deceased named therein unknown to the party or to the solicitor of the party who has lodged the Caveat. The object of this is to prevent the issue of any grant prior to the removal of the Caveat," *Cooles*, 14th Ed. p. 257; *Re Nandalal Set.* 55 C.W.N. 568—93 C.L.J. 190—A.I.R. 1955 Cal. 88. It is a precautionary measure, *Bhabatarini v. Hari Charan*; 90 C.W.N. 787 : 86 I.C. 38, and is in fact a request at large to an intending grantees of probate or letters for issue of citation to the Caveator before taking action in a Probate Court. *Vide* the Correspondence at 20 C.W.N. Ixxii (72); questions of title or of testator's power of alienation, or the legality of a bequest cannot be gone into when a caveat is filed, 19 All., 458 : 12 Bom., 164 : 4 Cal., I : 18 Bom., 749.

Right to lodge Caveat:—Any person who is an interested person within the meaning of sec. 288 and has *locus standi* under sec. 263 to ask for revocation is competent to lodge a Caveat under this section. *Vide* the cases at pp. 516 and 490, *ante*; and read there the test formulated for determining what interest is necessary to support a caveat. If the grant threatens to displace the interest which the caveator will otherwise be entitled to, then he will have the right to lodge a caveat, otherwise not, *Sowbhagiammal v. Komalangi Ammal*, 54 M.L.J. 382—A.I.R. 1928 Mad. 809—107 I.C. 420. A person authorised to manage the estate or to appoint a manager in respect of the estate, although not an executor by implication, is still a person with such interest as will entitle him to file a caveat, *Swatantranandji v. Lunidaram*. 99 Bom. L.R. 490—A.I.R. 1937 Bom. 397—171 I.C. 411. The widow of a predeceased son cannot, therefore, enter a Caveat. *Re Gobinda Chandra*, 17 C.W.N. 1141. Cf. *Perojshah v. Pestonje*, 34 Bom., 459. The mere fact of applying for grant does not give a person the right to enter a Caveat, *Sashibhusan v. Rajendra*, 40 Cal., 89 : 16 C.W.N. 1094 ; 15 I.C. 225. As to the right of the creditors respectively of the testator and of this heir-at-law to oppose the grant, read the notes at p. 584, *ante*. Where a person claims title in himself or paramount title or questions the power of disposition of the testator will have no right to oppose a grant, read *Sowbhagi Ammal v. Komalangi Ammal* and *Komalangi Ammal v. Sowbhagi Ammal*, and the other cases cited at pp. 490 and 547, *ante*. Cf. 67 C.W.N. 715. As to whether a respondent in a petition for letters of Administration who has not filed a caveat is precluded from raising objection in counter move, see *Revuthiamma v. Hamsa*. A.I.R. 1961 Andhra Pra. 19.

Objection to grant without lodging Caveat:—One can oppose a grant of probate or administration without first entering Caveat, *Khazandas v. Ram Saran*, 46 P.W.R. 1910 : 6 I.C. 650 ; *Moothoo v. Janki*. 1 L.B.R. 212. As to the *locus standi* of person not filing caveat to oppose grant or take steps in the proceeding, read *Violet Paterson v. A. B. Forbes*, 16 Luck, 107—1989 C.W.N. 989—A.I.R. 1940 Oudh, 16—184 I.C. 586.

Time limit:—There is no law in India corresponding to the English rule that a Caveat remains in force for six months only.

Time for entering Caveat:—Caveat may be entered before or after application for grant has been made. Cf. *Grey v. Charusila*, 88 Cal., 68; *Jarat v. Bissesswar*, 29 Cal., 245 (249); but ordinarily no Caveat is necessary after citation has been issued, *vide* 46 P.W.R. 1910, *supra*. Cf *Bhabatarini v. Hari Charan*, below. In an old case (of doubtful correctness) the right of opposition without Caveat was negatived, 10 C.L.R. 550, *infra*.

Procedure for entry of Caveat:—For procedure, see *Gauri Sankar v. Manroj Shukul*, 3 Pat. L.W. 198 : 41 I.C. 705. Grounds of objections etc. are to conform to the rules of pleadings and verification (as in O vi. r. 16). *Shwe Min v. Maung Gyi*, 3 Bur. L.J. 68 : A.I.B. 1924 Baug. 273 : 82 I.C. 973. As to the procedure to be followed when a cavarator sets up a subsequent will and avers that it revoked the earlier will wanted to be probated, *vide* notes under sec. 295, *post*. For the Original Side Rule (Ch. xxxv. r. 25) in this connection, see *Re Nandalal Set*, 65 C.W.N. 668 = 93 C.L.J. 190 = A.I.R. 1956 Cal. 88.

Mere Caveat does not render the proceeding Contentious:—Mere entry of a Caveat does not make the case a contentious one, *Chotalal v. Kabubai*, *supra*; *Salter v. Salter*, 1896 P. 291; the reason of this rule is that the Caveator may not intend to oppose the grant but only wants time to make enquiries, *Morgan v. Price*, 1896 P. 21. This reason does not hold good where an affidavit is filed in support of the Caveat, and then the proceeding will be looked upon as contentious, *Chotalal v. Kabubai*, 22 Bom., 261. Cf. *Violet Paterson v. A. E. Forbes*, 15 Luck 107 = 1939 O.W.N. 982 = A.I.R. 1940 Oudh, 16 = 184 I.C. 685.

Court-fee for Caveat:—A Caveat is an initiatory petition, 20 C.W.N. lxxii (72), and is chargeable with a Court-fee of Rs. 10 (formerly Rs. 5) under Art. 12 of Sch. II of the Court Fees Act, in all the provinces (*vide* the various Provincial Acts of 1922 amending the Court Fees Act, 1870).

Petition of objection of a party cited:—The petition of objection of a party who appears in response to a citation is not a Caveat, and is therefore not chargeable with Court fee as a Caveat, *vide* 20 C.W.N. lxxii (72); *Bhabatarini v. Haricharan*, 20 C.W.N. 787 ; 20 C.W.N. 124 (n); 86 I.C. 88. For *contra*, see *Tara-chand v. Debnath*, 10 C.L.R. 550. Strictly speaking, such a petition of objection ought to go without any Court fee at all as a written statement. But in practice it is stamped as an ordinary petition in Court. The practice is obviously unwarranted and should be discontinued having regard to sec. 268, *supra*.

Locus standi of cavarators and objectors:—Can be challenged by the propounder, unless the propounder has lost that right by waiver, *Banku B. Das v.*

Kashinath Das, 67 C.W.N. 258 - A.I.R. 1968 Cal. 85.

Form of Caveat:—See Schedule V. The form shows that the person who enters a Caveat admits that the property in question is a part of the deceased's estate but objects to due execution, testamentary capacity and so forth, *Abhiram v. Gopal*, 17 Cal. 48 (52).

Effect of failure of Caveat:—If a caveat fails for absence of interest, the caveator will be precluded by *res judicata* on the question of "interest" from founding a subsequent application for revocation, *Fradip Kumar Sarkar v. Umarani Bose*, A.I.R. 1959 Cal. 277.

Sub-sections (2) and (3):—If the Caveat is lodged with the District Delegate, he shall send a copy of it to the District Judge. If it is lodged with the District Judge, he should send a copy thereof to the District Delegate having jurisdiction over the deceased's "fixed place of abode," and to some other Court as he thinks fit.

285. [Pro. S. 72 & Suc. S. 253 & D. D. A. S. 6] No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court *may* think reasonable.

Effect of Caveat:—After the entry of a Caveat, a grant without notice to the Caveator is bad and is liable to be set aside. Cf. *Trimleston v. Trimleston*, 3 Hagg. 243. *Vide* the Calcutta Rules 25, 26; Bombay Rules, 584-96; Madras Rules 474-75, 477 and 479; *vide also Chotalal v. Bai Kabubai*, 22 Bom., 261.

286. [Pro. S. 73 ; Suc. S. 253A & D. D. A., S. 7] A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

Explanation:—"Contention" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

Power of District Delegate:—A District Delegate shall not make a grant (1) in contentious cases, and (2) in cases which are not fit to be dealt with by

him, vide sec. 287, *infra*. Cf. *Mt. Permashri v. Tilak Ram*, 133 I.C. 896 (Lab.). Compare his power with that of the District Registrar under sec. 48 of the English Probate Act, 1857. If the proceeding becomes contentious by reason of some objection, the District Delegate cannot deal with the matter any more, and if does that will be without Jurisdiction, *Ram Kishore v. Nand Kumar*, A.I.R. 1934 Oudh, 442-151 I.C. 849.

Contentious Proceedings :— *Vide* notes at pp. 517, 587, *ante*. Appearance to oppose makes the proceeding contentious. For appearance by pleader or recognised agent, see O. III of the C. P. Code, 1908. *Vide Phanindra v. Nagendra*, 89 C.L.J. 569 : A.I.R. 1925 Oudh 76 "Contention" as used in this section does not empower the objector to oppose the proceeding on the ground that there was no estate to be administered *Debendra v. Surendra*, 5 Pat. L.J. 107 ; (1920) Pat. 87 : 1 Pat. L.T. 19 : 54 I.C. 807. The contention referred to in the section must be as to the grant. Therefore, the existence of contest regarding the validity of the will in a regular suit before the ordinary Civil Court does not make the probate proceeding contentious. Even if it does so, the District Judge who can deal with a contentious matter will not be deprived of his jurisdiction to adjudicate upon the genuineness of the will or to grant a probate, *Mt. Permashri v. Tilak Ram*, A.I.R. 1932 Lab. 48-133 I.C. 896, *supra*.

287. [Pro. S. 74 ; Suc. S. 253B & D. D. A., S. 7] In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Cf. The District Registrar's power under sec 50 of English Probate Act, 1857.

288. [Pro. S. 75 ; Suc. S. 258C & D. D. A., S. 7] In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents which may have been filed therewith, shall be returned to the

Procedure where there is contention or District Delegate thinks probate or letters of administration should be refused in his Court.

person by whom the application was made, in order that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorised to do; and, in that case, the same shall be sent by him to the District Judge.

Return of application by District Delegate:—If a District Delegate who can deal with only a non-contentious matter (sec. 272) thinks that it is not proper for him to make a grant in the case, he should return the papers to the petitioner for presentation to the District Judge unless it is necessary to impound the documents, in which case he shall himself forward the papers to the District Judge. This will be the procedure also when a revocation application is filed in respect of the grant made by the District Delegate, see *Kailash Chandra v. Nanda Kumar*, 48 C.W.N. 751 = A.I.R. 1944 Cal. 886, cited under sec 272, ante. Cf. *Narendra Nath v. Fakirman*, A.I.R. 1952 Cal. 20. The District Judge will have power to assign a contentious matter to a subordinate Judge invested with power by High Court Notification ; see A.I.R. 1952 Cal. 20, *supra*.

289. [Pro. S. 76 ; Suc. S. 254 & D. D. A., Ss. 8, 9] When it appears to the District Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI.

Grant of Probate:—When the District Judge or the District Delegate finds, upon proof, that a probate should be granted, he shall (note the imperative character of the provision) grant the same under the seal of the Court and in the form set forth in Schedule VI. *Vide Hara Coomar v. Doorgamoni*, 21 Cal. 196 ; *Nagendra v. Sarat*, 51 I.C. 935 (Cal.) ; *Indar Narain v. Onkar Lal*, 141 P.L.R. 1911 : 220 P. R. 1912 : 238 P.W.R. 1911 : 10 I.C. 180. The form of probate prescribed by Sch. VI does not admit of the incorporation of private terms like the division of the estate of the testator and the putting of each party into separate possession of it, *Bishunath Rai v. Sarju Rai*, 1981 A.L.J. 896 = A.I.R. 1981 All. 745 = 139 I.C. 403. Grant should not be refused on the ground that the will is ineffectual, *vide* at p 420, ante. Legal incapacity is the only ground on which Probate may be refused, *Prannath v. Jadunath*, 20 All., 189, Cf. *Babu Misra v. Umer Pershad*, 110 P.W.R. 1918 : 45 I.C. 974. Grant should not be refused on a ground which has not been recognised by law as a ground of refusal. Therefore, an executor should not be refused probate simply for the reason that he disputed the genuineness of the will on a previous occasion, because there is no provision in the statute warranting such a ground of refusal. *Sailabala Dasi v. Baidyarat Rakshit*, 92 C. W. N. 729 = A. I. R. 1928 Cal. 580 = 110 I.C. 542.

Under this section probate is granted of the will itself (note the words "probate of a will") and not of any translation annexed to the petition of probate (as contemplated in sec. 277, ante); in the absence of an agreed translation, the Court is always bound to look into the original will. *Purna Chandra Dutt v. Sudhangsu S. Ghose*, I.L.R. (1946) 1 Cal. 1—49 O.W.N. 524—A.I.R. 1946 Cal. 55—224 I.O. 299—referring to *Manners v. Manners*, [1928] 1 Ch. 220; *Hallard v. Hallard*, [1885] 80 Oh D. 590, O.A.

Form of Probate—*Vide Schedule VI*. It should be noticed that the form does not set forth the time and place of the testator's death, though section 261 contemplates rectification of particulars regarding such time and place. The form contains the word "Credits" which means transactions that give rise to or terminate in debts.

Effect of Grant—It establishes conclusively the Legal character of the grantee, and is conclusive evidence of the validity of the will and its execution as also the testamentary capacity of the testator. *Satyacharan Das v. Hrishikesh Karar*, 68 O.W.N. 615—A.I.R. 1959 Cal. 795.

Date of Grant—The date of grant of probate is the day on which the order of grant is passed and not any subsequent date on which the order directing issue of grant is made. *Hari Ram v. Ram Singh*, 27 O.W.N. 285—A.I.R. 1928 Cal., 444 : 75 I.C. 918. Therefore, it is with reference to that date that the question of renunciation of executorship is to be considered, *Ibid.*

Probate Duty—An order for grant cannot be made until the petitioner has filed in Court a valuation of his property in the form prescribed in Sch. III of the Court Fees Act, (*vide Appendix B*) and has paid the fee mentioned in Article 11 of Sch. I of that Act [*Khubchand v. Matil Bai*, 80 S.L.R. 201—A.I.R. 1936 Sind. 150—165 I.O. 202]. We might have reproduced Article 11 here, but as complication has been introduced by the various Provincial amendments (of 1922) of the Court Fees Act, it is not possible to do so. For payment of fees under article 11, see *Re Rushton* 8 Cal., 736; *Re Abdool Aziz*, 23 Cal., 877; *Saldanha v. Secretary of State*, 24 Mad., 241; *Re Ram Chandra*, 24 Cal., 567. "Value of the property" under that Article means the net and not the gross value, *Re Quininborough*, 20 C.W.N. 591: 22 C.L.J. 160 (dissenting from *Collector of Maldah v. Nirod Kamini*, 17 O.W.N. 21); *Re Harriett Teviot*, 18 C.L.J. 308; 18 C.W.N. 121; *Re Mrs. Meik*, 40 All., 279; *Re Chin Yaing*, 7 Bur. L.T. 275; 24 I.O. 828. The fee is not necessarily payable at the time of application, *Re Aradhoney Dasi*, 5 C.W.N. coliv; but see *Re Umda Bibi*, 26 Cal., 407; For the purposes of duty only the properties in British India to be considered, *Re Abraham*, 21 Bom., 189; *Re Sasson*, 21 Bom., 678. Cf. *Commissioner v. Salting*, (1907) A.C. 449; *Re Ewing*, 6 P.D. 23. Read also the notes under the heading, "Probate Duty" at p. 528, ante.

Exemption of Savings Bank Deposit:—See secs. 4 and 8, Savings Bank Act, (V of 1878) as amended by Act XVI of 1928; also at pp 388-89, ante.

Chapter IIIA of Court Fees Act:—This Chapter of the Court Fees Act comprising the sections 19A to 19K has made certain important provisions for payment of duty on probates etc. and granting reliefs in cases of excess payments or allowing some exemptions, and making rules for notification to Revenue authorities and for penalties etc. which please see.

Trust property:—See sec. 19D of the Court fees Act; also *Collector v. Sav Chand*, 27 Bom., 140; *Collector v. Chunilal*, 29 Bom., 161; *Kashinath v. Gourabai*, 39 Bom., 245.

Mitakshara family property:—See *Re Dasu Manarala*, 99 Mad., 89. The essential features of such property are (1) unity of ownership of the joint property, and (2) unity of juristic existence in dealing with third parties. The family is a sort of corporation having a continued existence. Its continuation might change by birth, adoption, marriage or death but as regards strangers it is deemed to be a single individual, a separate legal entity. While this is so, as regards outsiders, as between the coparceners there is complete community of ownership and unity of possession. No individual member of the family, while it remains undivided can predicate of the joint and undivided property that he has a certain definite share; his interest in the coparcenary lapses on his death to the coparcenary and passes by survivorship to the other coparceners. There being no question of succession in relation to his interest, there arises no question of any devise or any grant under this Act in relation to the same. This is the general rule. But the position is different where a property is purchased with the joint family funds in the name of the *karta* or any other member of the family in his individual name, so that while the legal estate vests in him, the beneficial interest is in the family. On the death of such person no change takes place so far as the beneficial interest is concerned. The legal estate, however, does not pass by survivorship to the other coparceners and is subject to the provisions as regards grant of letters of administration to the surviving coparceners as his "heirs" to the legal estate. *Sri Ram v. Collector of Lahore*, I L.R. (1942) Lah. 717—44 P.L.R. 880—A.J.R. 1942 Lah. 178—202 I.C. 114 (F.B.).

Annuity:—Court-fee is to be paid on the market value of the annuity and not on ten times the amount of a yearly payment. *Re Bam Chunder*, 1 Bom., 118. *Re Rushton*, 3 Cal., 736.

Property subject to power of appointment:—See *Re Lakshmi Narayan*, 25 Mad., 515; *Commissioner v. Stephen*, (1904) A.C. 140; *Re George*, 6 B.L.R. 138; *Re Fulia Oram*, 12 B.L.R. App. 21; 21 W.R. 245.

290. [Pro. S. 77 ; Suc. S. 255] When it appears to the District Judge or District Delegate that letters of administration to be under seal of Court. administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII.

N B — Vide the notes under sec 289, *supra*, which mutatis mutandis apply to letters of administration. Letters can be granted only in absence of Probate, *Bam Singh v. Murtibai*, A.I.R. 1928 Nag. 41 : 68 I.C. 940. A grant does not subsist if it has been set aside by the High Court on appeal, *Birendra Nath v. Shibaram*, A.I.R. 1952 Cal. 478.

Colonial Probate Act :—Under the Colonial Probate Act (55 and 56 Vic. 6), which applies to the Colonies of the British Empire (excluding India), the practice is not to annex the will to the letters but to send an exemplification (p. 486, *ante*). The rule of this section should be compared with the provisions of that Act though that is not applicable here. *Vide Re William Rennie*, 40 Cal. 74 : 18 I.C. 907.

Letters of Administration in relation to Mitakshara family property :—Read the notes under the heading, "Mitakshara family property" at p. 558, *ante*.

291. [Pro. S. 78 ; Suc. S. 256] (1) Every person to whom any grant of letters of administration, other than a Administration Bond. grant under section 241, is committed, shall give a bond to the District Judge with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person—

(a) the exception made by sub-section (1) in respect of a grant under section 241 shall not operate :

(b) the District Judge may demand a like bond from any person to whom probate is granted.

"In the case of probate a bond can only be demanded from the special classes to whom Act V of 1881, applies"—*Joint Committee Report*.

N. B.—This section should be read along with the notes under secs. 278 and 241.

Sub-sec. (1): Administration Bond :—Such bond must be demanded, (notice the word *shall*) subject to the provisions of sub-sec. (2), from the grantees of letters of administration, if he is not the attorney of an absent executor (see sec. 241, *ante*). The object of making an exception in favour of the executor's attorney is to reserve for him the same benefit which has been intended for the executor himself. Under sub-sec. 2(a), which applies to the Hindus and the exempted classes, the executor's attorney does not enjoy the exemption reserved for him under sub-sec. (1). So in the cases of these special sects, the executor's attorney is bound to furnish security for the letters of administration granted to him under sec. 241. Consult A.I.R.

Rigidity of the Rule. 1955 Trav.-Co. 102, cited at p. 455. The rule enacted in this section is rather rigid and should not be departed from.

Re Powis, 34 L.J. P. & M. 55; *Aaron Shalome*, 28 Cal., 408: 3 O.W.N. 867. The Form of Bond. bond shall be in such form as the Judge, by general or

special order, directs, *Ibid.* It may be in the English-form, and provide for submission of inventory and accounts, *Ibid.* The section is not limited in its operation to the time when the grant is first made, but extends to the case when the bond becomes inoperative by the surety's death or from some other cause, *Rajnaraian v. Fulkumari*, 29 Cal., 68; 6 C.W.N. 7; the Court after once having taken a bond can call for a second bond with fresh securities, if necessary, *Ibid.* Such necessity may arise from such new situation as the breakdown or unexpected death of the surety or from rise in the value of the estate or unforeseen increase of assets; and then, it will be competent for the Court to demand a new bond or additional security, *Surendra v. Amritalal*, 47 Cal., 115; 29 O.L.J. 496: 23 O.W.N. 763: 61 I.O. 986; *Bhagwan Devi v. Banka Mal*, 66 I.O. 367: 2 P.W.R. 1922. But see *Subraya Chetty v. Rajammal*, 28 Mad. 161, followed in *Kanhyalal v. Manki*, 31 All., 56. Vide notes and cases under the heading, "Liability of Sureties," *infra*; also *Re Fozard*, 2 H.W. & Tr. 179: *Re Stacpool*, 2 Sw. & Tr. 316. A surety to an administration bond cannot discharge himself without an order of Court, *Nanilal Das, In re*, I.L.R. (1939) 2 Cal. 1—A.I.R. 1989 Cal. 787.

Object of the Bond :—The security is required to guard against mal-practices, and it will be enough if it affords a reasonable protection against them or provides a safeguard against serious or continuous mismanagement, *Ameer Chand v. Mohanund Bibi*, 6 O.L.J. 459 (460), following 1 O.L.J. 180 (cited *infra*). Cf. *Debendra v. Administrator-General*, cited below.

Consequences of not furnishing the required security :—If the order of the Court demanding security is not complied with, that will be a ground for revoking the grant, *Surendra v. Amritalal*, *supra*. But see *Parbati v. Prem Sukh*, 7 Lah. L.J. 89; 26 Punj. L.R. 563: A.I.R. 1925 Lah. 354; 86 I.C. 563: where it has been held that the order demanding security is independent of the order of grant, therefore, a grant should not be revoked because of failure to give security, specially when no time is fixed for the purpose.

Bond to the District Judge:—The administration-bond in this section should be executed in favour of the District Judge or his successor in office, and the undertaking or engagement must be with him. Cf. 33 Cal. 718 (cited below).

Assignment. If action is necessary on the bond, the Judge should assign it to the party about to take such action, *Amarnath v. Thakurdas*, 5 All. 248 ; also *vide* sec. 292, *post*. While one such assignment is still in force, the Judge cannot assign it a second time, *Kalimuddin v. Mahurni*, 89 Cal. 663 : 16 C.W.N. 662 : 15 O.L.J. 882 : 18 I.O. 690.

High Court Practice:—In the High Court, the bond is given in the name of the Chief Justice, and the assignment is made by the Registrar of the Original Side, see *Debendra v. Administrator-General*, 33 Cal. 718 (cited below). *Vide* High Court Rules, 15 to 18, Ch. xxxv ; Bombay Rules, 576-78 ; Madras Rules, 464, 466, 470. Read also A.I.R. 1958 Cal. 206. The High Court to which a guarantee is given by a surety has power to exonerate the surety from all future transactions. When the High Court proposes to grant release to the surety, it must be satisfied that there are grounds for doing so and must provide for safeguards for the heirs of the deceased, *Avinash Ch. Banerjee In re*, 64 All. 283-1932 A.L.J. 140-A.L.B. 1932 All. 262-140 I.C. 127.

Sub-sec. (2) : Security from Executor:—An executor is the testator's choice, and, therefore, security should not be demanded from him except *optionally* in the cases contemplated by sub-sec. (2). Under that sub-sec. the Court has a discretion to demand an administration-bond from the executor ; [notice the word "may" in sub-ol. (b) of sub-sec. (2)]. *Surendra v. Amiritalal*, 47 Cal. 115-29 O.L.J. 496-28 C.W.N. 763-61 I.C. 986, *supra* ; *Mohamaya's case, infra* ; *Zubeida Khatoon v. Muhammad Zakaria*, A.I.R. 1988 Rang. 67-174 I.O. 421. Where the testator has mentioned in the will that the executor would obtain probate without security, it is not the function of the Court to distrust the executor and ask for security from him quite contrary to the testator's wishes, *Monmohini Dass v. Taramoni*, A.I.R. 1939 Cal. 738. Where the executor is the sole legatee, if the Court thinks it necessary to take any bond from him, the amount of security should be a nominal sum. *Ibid.* If the bond is demanded from him at all, it should be demanded at the time of the grant of probate and not *at any time thereafter*, *Ganilala v. Bijoy Krishna*, 31 Cal., 688 : 8 C.W.N. 668. A bond should be taken from the executor if he is of immature age or seem to have other short comings, *Mahamaya v. Gangamoyi*, 1 C.L.J. 180 ; Cf. *Grishby v. Cocke*, 85 Ky. 814 : *Bird v. Wiggins*, 85 N.J.N.Q. 11 ; also, *Ran Bahadur v. Bajrup Koer*, 4 O.L.R. 498 ; *Its Jagadishwari*, 7 Cal., 84. Remember here that the executor gets the probate and the other persons only the letters of administration.

Position in the case of Christian testators:—Sub-section (2) is limited in its operation to the particular classes enumerated therein. A Christian is not within

any of the categories so specified ; therefore, when letters are granted in respect of the will of a deceased Christian to his executor's attorney under sec. 241 of the Act, no bond will be necessary. Similarly, no bond will be demandable from his executor at the time of the grant of a probate to him because of the District Judge's discretion as under sub-sec. (2) (b), *L T. Dinesen v. Emperor*, 40 P.L.R. 22 - A.I.B. 1988 Lah. 151 - 177 I.C. 891.

Amount of Security :—The security is to be taken only for such an amount as will just ensure the safety of the estate and no more. *Ameer Chand v. Mohanund Bibi*. 6 C.L.J. 453 ; *Mohamayya v. Gangamoyi*, 1 C.L.J. 180 ; the judge has always a discretion in the matter of fixing the amount, *Re Juggodishri*, 7 Cal., 84. An extravagantly high figure should not be fixed as that will put an obstacle in the way of the applicant, Cl. 6 C.L.J. 453, *supra*. Therefore, ordinarily, where security is demanded from the executor, only a nominal sum should be asked from him, *Monmohini Dasi v. Taramoni*, A.I.R. 1929 Cal. 783.

Liability on breach of Bond :—If there is a breach of the bond, the whole amount of it is not recoverable, but only reasonable compensation for the breach. *Chandra Mohan v. Rohini Dasi*, 64 I.C. 366 (Cal.) ; *Cursetji v. Dadalhai*, 19 Mad. 425. Such a case does not fall within the meaning of the exception to section 74 of the Contract Act. Therefore, the assignee of the bond is entitled only to the amount of actual damage resulting from the breach, *Lachmandas v. Chater*, 10 All., 29. The plaintiff in an action upon the assigned bond cannot sue to recover merely his share of the actual loss, but he must sue in a representative capacity as trustee of all persons interested in the estate, to recover the full amount of the actual damage, *Mi Saw v. Naga Nian*, (1918) 1 U.B.R. 274 : 21 I.C. 297. Cf. *Cope v. Burnett*, (1911) 2 Ch. 488. For administration bonds, and sureties' liabilities, read generally (1954) 2 All. E.R. 736.

Liability lasts during administration and not thereafter :—The liability lasts only during the course of administration and not after the estate is fully administered, even if thereafter the administrator be in possession of the property as an heir, *Ramanathan v. Ragammal*, 17 M.L.T. 61 : 27 I.C. 849. See, however, *Nani-Lal Das*, *In re*, I.L.R. (1989) 2 Cal. 1 - A.I.R. 1989 Cal. 737 which has held that the Court cannot order the discharge of the surety on the ground of completion of the administration. In the English case of *Harvell v. Ecster*, (1864) 1 All. E.R. 85, the Court held that when the administrator has made all necessary payment and wound up the estate, the liability of the surety comes to an end (Per Lord Goddard, C.J.).

Liability of Sureties :—The invalidity of the grant does not render the surety bond void and inoperative. The liability of the surety will be determined by the terms of the bond, and it cannot be avoided by the plea that the grant is invalid.

Dobendra v. Administrator-General, 89 Cal., 713 : 10 C.W.N. 673 : 8 C.L.J. 422 (F.B.); affirmed on appeal, 85 Cal., 955 : 12 C.W.N. 802 : 8 C.L.J. 94 (P.C.). Though the grant was obtained by fraud and the sureties were induced by misrepresentation to execute the bond, still their liability will continue, *Ibid.* If the law were otherwise, the very object of the bond would be frustrated, *Ibid.* The facts that the sureties themselves were no parties to the fraud, and that they were not cognisant of it make no difference, *Ibid.* Likewise, it is said that a bond is not invalidated by reason of a mutual mistake on the part of the Court and the surety or misrepresentation by the Court, *Sarat Chandra v. Rajani*, 12 C.W.N. 481 (486). The Court will not discharge the original sureties and substitute other sureties in their place, *Re Stark*, L.R. 1 P. & D. 76. The Calcutta High Court has held that where the administrator is not administering the estate, and the surety is powerless to stop it, the latter is entitled to withdraw by instituting administration proceedings, *Raj Narain v. Phul Kumari*, 29 Cal., 68 : 6 C.W.N. 7. Similarly, it is maintained in the Punjab that where the executor is wasting the estate, the surety is entitled to be discharged, *Shahaluddin v. Fazal Din*, 62 P.R. 1902 : 89 P.L.R. 1902. But this view has not been accepted by the Madras and Bombay High Courts. According to them the surety is not entitled to be released from his liability (whether past or future) on the ground that the administrator is mismanaging or wasting the estate, either by way of application in the Probate Court or by a separate suit, *Subraya v. Rajammal*, 28 Mad., 161, (following *Bai Seme v. Mangaldas*, 19 Bom., 245). It is not mal-administration but only fulfilment of obligation by the administrator that can justify discharge of the surety. Mal-administration may at best be a ground for revoking the grant or taking appropriate steps to control the administration, *Nani Lal Das In re*, I.L.R. (1939) 2 Cal. 1—A.I.R. 1939 Cal. 737. The Allahabad High Court holds that there is no 'continuing guarantee' by a surety within the meaning of section 129 of the Contract Act, and, therefore, such a surety cannot of his own free will withdraw under sec. 180 thereof, *Kanhyalal v. Manki*, 31 All., 66 : 6 A.L.J. 19 : 1 I.C. 148 ; see *Subraya v. Rajammal*, 28 Mad. 161; *Raj Narain v. Fulukumari*, 29 Cal. 68. Although secs. 129 and 180 of the Contract Act, preclude the Surety from putting an end to the guarantee at his sweet will or from claiming as of right to be relieved of his liability by merely expressing his intention to do so (either by notice or by an application to the Court), still the Court has power, on good cause shown, to cancel the undertaking. Such release will, however, be operative only after the date of the release and in respect of the future transactions but not in respect of past mal-administration, *Abinas Chandra In re*, 54 All. 293—1932 A.L.J. 140—A.I.R. 1932 All. 262—140 I.C. 127. The Lahore Court has held that a surety for the due administration by an executor is entitled to be discharged from his liability as regards the future transactions of the executor on showing good cause, as for example, when the executor is adjudged an insolvent, *Sri Ram v. Emperor*, I L.R. (1939) Lab. 424—41 P.L.R. 768—A.I.R. 1940 Lab. 38—187 I.C. 93. The High Court possesses special powers in the matter of releasing the surety from his future liabilities,

read the notes under the heading, "High Court Practice" at p. 581, *ante*, and see *Avinash Chandra Basarji*, *In re*, 54 All. 298 = 1932 A.I.R. 140 = A.I.R. 1932 All. 262 = 140 I.C. 127. When a surety is released from his liability by an order of the Court, his liability ceases from the date of the order with respect to all future transactions; but his liability for mal-administration remains with respect to all transactions prior to his release, *viva Ibid.* In proceedings against an administrator (for mal-administration), the surety is a necessary party. *Ilamadane v. Ma Shwa Gon*, 4 Rang. 368 = A.I.R. 1927 Rang. 28 = 93 I.C. 459.

Sub-sec. (2):—In the case of Hindus etc. (1) the exception in favour of the attorney of an absent executor does not apply and (2) a bond may be demanded from the executor.

Administrator-General:—Is exempted from giving a bond, see sec. 29 of his Act, III of 1913. *Vide* also the notes at p. 528, *supra*.

Limitation:—According to some opinion a suit to enforce a surety's liability under an administration bond is governed by Art. 68 of the Indian Limitation Act, (now see Art 90 of Act xxxvi of 1963), *Ammu Moola v. Fatima*, 8 Bur. L.T. 69 : 26 I.C. 505, *Ramanathan Chetty v. Rajammal*, 17 M.I.T. 61 = A.I.R. 1915 Mad. 1184 = 27 I.C. 849; but there are cases which have held that in such a case Art. 120 and not Article 68 is applicable, *Kanti Chanda v. Ali Nabi*, 33 All. 414 = 8 A.I.J. 199 = 9 I.C. 935, *Ho Pu v. Ma Thim*, 12 Bur. L.T. 225 = 56 I.C. 968; *Manubhai (hunilal v General Accident P. & L. Co., Ltd.*, 60 Bom. 1027 = 38 Bom. L.R. 632 = 4 I.R. 1936 Bom. 368 = 165 I.C. 672; read author's Limitation Act, p. 703, also *General Accidents Fire and Life Assurance Co. v. Jon Makomed*, 67 I.A. 416 = I.L.R. (1941) Bom. 202 = 72 O.L.J. 497 = 45 C.W.N. 429 = 48 Bom. L.R. 346 = (1941) 1 M.L.J. 88 = A.I.R. 1941 P.C. 6 = 193 I.C. 226 (P.C.).

Appeal:—No appeal lies from an order as to security on the ground of its insufficiency, *Lucas v. Lucas* 20 Cal. 245. An order granting probate on the condition of security being furnished, however, is appealable, *Dineen v. Emperor*, 40 P.L.B. 22 = A.I.R. 1938 Lab. 161 = 177 I.C. 891. The question of demand of security being purely a discretionary matter with the Judge should not be lightly interfered with except in cases of gross miscarriage of justice, *Zubaida Khatoon v. Muhammad Zakaria*, A.I.R. 1938 Rang. 67 = 174 I.C. 421.

292. [Pro. S. 79 ; Suc. S. 257] The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court

may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

Analogous Law :—*Vide* sec 83 of the English Probate Act, 1857 (20 & 21 Vic, C 77).

Engagement not kept.—The following are instances of breaches of the engagement in the bond :—(a) failure to exhibit inventory, *Luchmandas v Chater*, 10 All. 29, (b) omission to pay legacy inspite of sufficient assets in hand, *Folls v. Docminique*, 2 Stra. 1197 ; (c) non-submission of true accounts, *Archbishop v. Willis*, 1 Balk. 172 (d) conversion of goods for the administrator's own use, *Arenlusharp v. Robertson Crompt & M.C* 90, N. B. Non payment of a particular debt is no such breach, *Sundry v. Michell*, 8 H & S. 405 As to the extent of liability for such breach, and the manner in which such liability can be enforced, *vide* the notes at p 561, *ante*.

Assignment of Bond :—If the engagement of the bond is not kept the Court will assign it to the party intending to take action on it, *vide* notes at p. 561, *ante*; also *Re Saunders*, 6 N.W.P. H.C.R. 62; such assignment is not confined to private individuals, and can be in favour of the Administrator-General, *vide Debendranath's case* (33 Cal., 718), *supra*. The bond can be assigned to a creditor, *Luchmandas v. Chater*, 10 All., 29, *supra*; *Sundry v. Michell*, *supra*; but not to a creditor who can otherwise recover his debt, *Re Saunders*, *supra*. Re-assignment, while the first assignment is in force is not permissible, *see Kalimuddin's case*, cited at p. 561. The first assignment spends itself where the assignee fails to comply with the conditions on which the assignment was made, and then re-assignment is possible, *Ibid.* It seems that assignment can be made upon terms, *Ibid.* An application for assignment of bond should not be rejected without perusal of the bond or without proper consideration of the attendant circumstances, *Swendra Narain Singh v. Lal Bahadur*, A.I.B. 1935 All. 705-154 I.C. 816. As to successive applications for assignment, *vide* under the heading, "Procedure", below.

If the Bond can be vacated : There is no provision in the Act to enable the Court to make an order vacating the administration bond, *Re Arthur Gerland*, 7 Mad., 160.

On being satisfied :—Before making an assignment, the Court must be satisfied that the engagement has been broken, *Re Young*, L.R. 1 P. & D. 186; 85 L.J. 126.

Prima facie proof may induce the Court to assign, *Re Saunders, supra*; *Archbishop v. Robertson, supra*; the Court seems to have a discretion in the matter and may refuse to assign, if the ground urged is frivolous and vexatious, *Baker v. Brooks, 3 Sw. & Tr. 32.*

Procedure:—Assignment should be made only on a petition by way of motion, see *Mr. Saw v. Nga Nyan, (1918) 1 U.B.R. 174; 21 I.C. 297.* Dismissal of a previous application for assignment for default and without adjudication on the merits does not bar a subsequent application for the same purpose; successive applications regarding this matter can be made exactly in the same, way as successive applications can be made in execution proceedings. *Haribux v. Sham-sundar, A.I.R. 1935 Lah. 145 = 161 I.C. 384.*

Notice:—Before assignment notice of the application should be given to the administrator and his sureties, *Marshman v. Hughes, 3 Sw. & Tr. 32; Baker v. Brooks, supra.*

Who can sue:—No one except the Judge or the person to whom the bond is assigned can sue, *Amar Nath v. Thakurdas, 5 All. 248.* Even a succeeding administrator cannot sue the outgoing administrator or his sureties without such assignment *Ibid.*

Rights of the Assignee:—The assignee of the bond acquires by virtue of the assignment a fresh and independent cause of action. The section confers substantive rights and does not deal with a mere rule of procedure, *Manubhai Chunilal v. General Accident Fire and Life Assurance, 38 Bom. L.R. 682 = A.I.R. 1936 Bom. 363 = 165 I.C. 672.*

Nature of the Suit:—*Vide* notes under the heading, "Liability on breach of Bond," at p. 562, *ante*

Amount that can be recovered by the Assignee:—The assignee will be entitled to recover "the full amount recoverable in respect of any breach of the bond" which means the full amount of the loss for which the obligors under the bond are liable and does not mean the amount recoverable in law at the date of the assignment, *Manubhai Chunilal v. General Accident Fire and Life Assurance Corp. Ltd., 38 Bom. L.R. 682 = A.I.R. 1936 Bom. 363 = 165 I.C. 672.*

Limitation:—A suit by an assignee of an administration bond under this section, for its enforcement is a suit upon a bond subject to a condition to which Art. 68 of the Limitation Act, (now Art. 80 of Act xxxvi of 1963) applies. Where the administrator, dies, the condition must be deemed to have been broken at the latest on that date and limitation would begin to run

from that date. This section has not the effect of conferring a new cause of action on the assignee or of providing a new starting point. *General Accident Fire and Life Assurance Corp. v. Janmahomed Abdul Rahim*, 67 I.A. 418 = I.L.R. (1941) Bom. 202 = 72 C.L.J. 497 = 43 Bom. L.R. 846 = 45 C.W.N. 429 = (1941) 1 M.L.J. 88 = A.I.R. 1941 P.C. 6 = 193 I.C. 225 (P.C.)—on appeal from *Manubhai Chunilal v. G.A.F. & Life Assurance Corp. Ltd.*, 88 Bom. L.R. 682 = A.I.R. 1936 Bom. 363 = 165 I.C. 672. Consult also the cases cited under the heading, "Limitation", at p. 564, ante.

Appeal:—No appeal lies from the order of assignment under this section. *Kalimuddin v. Mahurni*, 89 Cal., 563 : 18 C.W.N. 662 : 15 C.L.J. 882 : 18 I.C. 690. Cf. *Brojonath v. Dasmont* 2 C.L.J. 589 ; *Abhiram v. Gopal*, 17 Cal., 48. *Contra*. *Umachurn v. Muktakeshi*, 28 Cal., 149 ; *U. po. Hnit v. Maunj Gyi*, A.I.R. 1929 Rang. 109 = 118 I.C. 401.

Revision:—*Vide Kalimuddin's case, supra.*

293. [Pro. S. 80 ; Suc. S. 258] No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days from the day of the testator or intestate's death.

Time for grant of probate and administration:—Probate cannot be granted until after the expiration of 7 clear days, and letters of administration until after 14 clear days from the date of the testator's or intestate's death. The word "clear" shows that a part of a day cannot be considered. The section contemplates only administration without the will annexed, and not *cum testamento annexo*. Therefore letters of administration with the will annexed can be granted after the expiration of seven clear days from the testator's death, *Re Wilson*, 1 Cal., 140. The section prohibits the grant and not the making of an application for the purpose within the time limited hereby, *Ibid.*

Limitation for application for Probate:—*Vide the notes at pp. 502-3, ante.* *Vide* under the next heading, also 62 C.W.N. 790.

Delay:—For the effect of delay in applying for probate, *vide* notes at pp. 494 and 589, ante and read *Benodini v. Hridoynath*, 22 C.W.N. 424 = 45 I.C. 187, cited at p. 589, under the heading, "Belated appearance of will." Read also *Kalinath Chatterjee v. Nagendranath*, 62 C.W.N. 790 ; *Manindra Chandra v. Mahalwami Bank*, 49 C.W.N. 481 = A.I.R. 1945 P.C. 105. Also Coote's 16th Ed. p. 74. Delay simply serves to throw a doubt on the genuineness of the will, but where that doubt is repelled, *negre* delay *per se* will be no ground for refusing a grant, *infra*.

much as the law of Limitation has not much to do with the probate proceedings. *Durgavada Bera v. Atul Chandra*, 41 C.W.N. 1204—A.I.R. 1987 Cal. 696. Thus, where delay is explained away by inability to raise the huge probate duty, it would not matter much. *Gayeshwar Prasad v. Bhagwati Kuer*. A.I.R. 1988 Pat. 612—148 I.C. 5.

294. [Pro. S. 81 & Suc. S. 259] (1) Every District Judge, or District Delegate, shall file and preserve all original wills, of which probate or letters of administration with will annexed may be granted. granted by him, among the records of his Court, until some public registry for wills is established.

(2) The State Government shall make regulations for the preservation and inspection of the wills so filed.

N.B.—See secs 42 and 66 of the English Probate Act, 1867.

Preservation of probated wills:—The section directs the Judge or Delegate to preserve the original wills filed and proved before him among the records of his Court, until some public Registry for wills is established : No special public registry has been established as yet ; but there are provisions in the Registration Act (xvi of 1908) for the deposit of wills, *vide* sec. 27 ; also secs 42 to 46.

Shall file:—If a will is not filed as required hereby, the grant will be defective and liable to be revoked, *Re Grant*, 1 P.R. 1902.

Sub-sec. (2):—A rule making power is hereby conferred on the Local Government for making regulations for the preservation and inspection of wills filed in conformity with this section.

295 [Pro. S. 83 & Suc. S. 261] In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letter of administration, as the case may be shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

Procedure in contentious cases:—The section lays down that in contentious cases before the District Judge, the proceedings shall take, as nearly as may be, the form of a regular suit under the C.P. Code, 1908, in which the applicant for

grant is regarded as the plaintiff and the objector as the defendant. *Kalyan Chand v. Sitalbai*, 88 Bom., 809 : 16 Bom. L.R. 5 : 23 I.C. 325 : *Noor Mohammad v. Mohamad Kareem*, (1988) 1 M.L.J. 443 - 47 L.W. 485 - 1988 M.W.N. 1139 - A.I.R. 1988 Mad. 502 - 176 I.C. 895 ; *Gangabai v. Jaikishin Das*, A.I.R. 1988 Sind, 38 - 178 I.C. 284 (F.B.). The proceeding partaking of the nature of a suit, it is not open to the Probate Court to hear it in a summary fashion, *Noor Mohammad v. Mohamad Kareem, supra*. The proceeding being a suit, the effect is that when an appeal is preferred from the decree made in it, a copy of the decree will have to be filed along with the memorandum of appeal under O. XLI, r. 1, C.P. Code. *Gangabai v. Jaikishin Das, supra*; see also *Hemchandra v. Jadab*, 16 C.L.J. 116 - 17 I.C. 99. Read, however, *Bohra Kanhaiya Lal v. Gendo*, 60 All. 288 - A.I.R. 1928 All. 51 - 107 I.C. 84. No mention is herein made of the District Delegate, as he cannot hear a contentious matter, see secs. 265 and 268, ante. For distinction between common form grants and solemn form grants, vide at pp. 586-87, ante. *Ex parte* grants in the moffusil, strictly speaking, are something midway between these two forms of grants, *Durgabati v. Saurabini*, 99 Cal., 1001.

Scope of the Section :—The provisions of this section are limited to contentious proceedings only, *Rebells v. Rebells*, 2 C.W.N. 100. For applicability of the C.P. Code to all probate proceedings, contentious and non-contentious, vide sec. 268, ante.

Contentious proceedings :—Vide notes at pp. 517, 587, 555 and read (1888) 89 Ch. D 693. As to when the proceedings become contentious, vide 14 C.W.N. 924 (cited at p. 509, ante). Mere citation or entry of caveat does not make the proceeding contentious, *Abhoya v. Saroja*, 41 Cal., 819 : 24 I.C. 27 ; unless there is an affidavit in support of it (p. 558) ; or there is an appearance to oppose the proceeding (sec. 286) ; see, 18 Bom., 287 ; 22 Bom. 261 ; 1 C.L.J. 49n ; also *Mohan v. Piao*, 1896 P. 214 ; *Salter v. Salter*, 1896 P. 291 ; *Violet Paterson v. A. E. Forbes*, 15 Luck 107 - 1939 O W N. 992 - A.I.R. 1940 Oudh, 16 - 184 I.C. 635. Cf. 1951 S.O.J. 413 - A.I.R. 1951 S.C. 280, s.c. *Nathurani v. Sm. Lera*, 1960 M.P.L.J. (notes) 201. Withdrawal of pleader after entering appearance for opposition does not make, nor transform the proceeding into, a non-contentious one, *Ihazindra v. Nagendra*, 89 C.L.J. 569 : A.I.R. 1925 Cal., 75. The rule that the existence of contention disbars a District Delegate from granting, probate or Letters of Administration does not apply to a District Judge ; therefore, the District Judge can make a grant even where the validity of the will is being questioned in a Civil Court, *Permeshri v. Tilak Ram*, 193 I.C. 896 (Lab).

O. P. Code does not apply in its entirety :—The provisions of the Civil Procedure Code apply only as nearly as may be and not entirely. Cf. *Ramani v. Kumudbandhu*, 14 C.W.N. 924. So it has been held that where the objector (caveator) refused to answer a question, O.xvi, r. 20 will not justify the Court to dispense with the

proof of the execution and grant a probate, *Ravji Ranchoo Naik v. Vishwanath*, 9 Bom., 241. Likewise, the provision of O.xxiii, r. 1 was held inapplicable when the withdrawal of the probate application was before the proceeding became contentious, *Pakiam v. Innas Fernand*, 19 Mad., 458. As to what provisions of the Code have or have not been applied to probate proceedings, *vide* the cases at p. 509, *ante*. As a proceeding does not become contentious and a suit before entry of caveat, it necessarily follows that there can be no stay of proceeding under sec. 10 of the C.P. Code or appointment of receiver under O.XL of the Code at the instance of a person who has not filed any objection or entered a caveat, in as much as all the above proceedings are possible only in a suit, *Violet Paterson v. Adelaide Elizabeth Forbes*, 15 Luck. 107 = 1939 O W N. 932 = A I R 1940 Oudh, 16 = 184 I C 585; but where the proceedings become contentious by entry of objections and converted into suits, the question of the applicability of sec 10 of the C.P. Code may arise if rival proceedings are taken in different Courts and then the question of date of institution of the suit becomes pertinent and for that purpose the date of the proceeding becoming contentious is taken to relate back to the date when the proceeding was originally started *Re Violet Petersen*, 15 Luck 290 = 1940 O W N. 1 = A I.R. 1940 Oudh, 118 = 185 I C 577.

Receiver:—*Vide* notes under sec. 268 as also under the last heading. A person who has not entered a caveat has no *locus standi* to appear and oppose an application for the appointment of a receiver, *Violet Paterson v. Adelaide Elizabeth Forbes, supra*.

Arbitration:—See *Ghella Bai v. Nandubai*, 21 Bom., 335 and the other cases at p. 509, *ante*.

Form of a Suit:—The contentious proceeding takes the form of a suit, *Kalyanchand v. Sitabar*, 38 Bom., 309 : 16 Bom. L.R. 5 = 28 I.C. 825 ; also 16 Bom., 287 ; *Annada v. Jagatmoni*, 6 C.L.R. 176 *Chotalal v. Bai Kabubai*, 22 Bom., 261 ; *Arunmoyi v. Mohendra Wadadar*, 20 Cal., 888, *Ochaveram v. Dolathram*, 644, *Ameer Chand v. Mohanund Bibi*, 6 O.L.J. 453 (456) So it has been said that probate proceedings fall within the description of 'suit', not in point of fact, but, of form for the limited purpose of applying to it, as nearly as may be, the provisions of the C.P. Code, *Sundr Bai v. Collector of Belgaum*, 38 Bom., 256 ; 10 Bom. L.R. 1197 = 2 I.C. 288 ; *Kalitara v. Nobin*, 21 W.R. 84 So questions of title to the estate or other similar questions should not be gone into, *Madhu Sudan v. Jagadindra*, 20 O.L.J. 307 : 27 I.C. 24. *Vide* also under the heading, "Questions of title" at pp. 408, 419. The Probate Court decides only the question of representation of the estate and the genuineness of the will, *vide* the cases at p. 419, *ante*; also *Re Dawubai*, 18 Bom., 287 (240); *Maung Tun v. Ma Sein* 1 Bur. L.J. 69 : A.I.R. 1923 Rang. 9 : 68 I.C. 671. All other enquiries are foreign to a probate proceeding (p. 408); 17 C.W.N. 618 ; and decisions thereon

are outside the competency of the Court and therefore do not operate as *res judicata*, see A.I.R. 1928 Rang. 9, (*supra*), and vide notes at pp. 489, 510. As to what is a "suit", see *Re Chirangi Mal*, 145 P.R. 18. Although a contentious proceeding takes the form of a suit, still no decree shall need be passed by the Court in the case, *Daval Das v. Bhairatri Sabha*, A.I.R. 1945 Pesh. 22 = 219 I.C. 229. As to the frame of the suit and the arraying of parties in a case in which the applicant for probate sets up a will and adds that a subsequent codicil was revoked and other parties rely on that codicil and want a grant for the same, read *Re Narendra Narayan*, 50 C.W.N. 126.

Dismissal for defendant:—See *Veerappa v. Subba Rao*, 62 I.C. 689 (Mad.), *Ramani v. Kumudbandhu*, 14 C.W.N. 824 (1926); *Ganeshyamdas v. Saraswatis*, A.I.R. 1925 Mad 861 : 21 L.W. 415; *Ngwe Hmon v. Ma Po*, 6 Bur. L.T. 87 ; 20 I.C. 281. For the applicability of O. ix, r. 8 of the C.P. Code, read *Rajpal v. Manohar Lal*, 38 P.L.R. 973 = A.I.R. 1986 Lah. 868 = 167 I.C. 616; also the notes under the heading, "Order under the C.P. Code" under sec. 299, *post*.

Res Judicata:—*Vide* under the heading, previous to the last one, and the notes at pp. 489, 510, *ante*. Also, *Kalyanchand v. Sitabas*, '38 Bom. 869 : 16 Bom. L.R. 6 : 28 I.C. 825; *Ramani v. Kumudbandhu*, 14 U.W.N. 824; *Ma Tun Sein*, 1 Bur. L.J. 59 : 68 I.C. 671. With respect to the questions of the testator's religious faith (that is, whether he is a Mahomedan or a Christian) or his relationship or power of disposition, the Probate Court proceeds on certain assumptions, but there is no presumption in any way that such assumptions are correct. *Rashid Abdulla v. Minhaluz Hasan*, A.I.R. 1988 Nag. 178 = 175 I.C. 687.

Rules of Pleadings and Verification:—The Probate Court is bound to follow the rules of pleadings and verification, *vide* p 533, *ante*; *Shwe Min v. Maung Gyi*, 3 Bur. L.J. 68 : A.I.R. 1924 Rang. 273 : 82 I.C. 973.

Form of Plaintiff:—*Re Harendra Krishna*, 5 C.W.N. 883. By having the form of a plaint, the application does not become a plaint in actuality.

Rules of Evidence:—The Indian Evidence Act applies to all judicial proceedings, sec. 1 of the Ind. Evidence Act, *Vsde Madhuri Ghose's Evidence Act*, pp. 18-14; therefore the objector has the right to cross-examine the applicant and his witnesses. *Chatto Kurmi v. Rajaram*, 11 C.L.J. 124 (180), F.B. Cf. *Guru Chand v. Ram Narain*, 9 W.R. 587 (588). For the objection of a party to file a *firsat* (list of documents), see *Sursudra v. Kasmoni*, 1 C.L.J. 49n. As to how literal compliance with sec. 68 of the Evidence Act may fall short of the requirements of sec. 68 (c) of this Act which necessitates proof of two valid attestations, read *Roda Framoona v. Kanta Varjewandas*, 17 Bom. L.R. 708 and the notes at p. 118, *ante*. The rules of evidence being applicable, the Court is bound to examine all

the witnesses tendered by a party. *Sajandas v. Chstram*, A.I.B. 1965 Ajmer, 88.

Plaintiff:—The provisions of C.P. Code apply to probate proceedings only as nearly as possible. Therefore, an applicant for probate is not a plaintiff to all intents and purposes, and cannot be regarded as a plaintiff who brings a suit in respect of some cause of action within the meaning of O. ix. r. 9, *Ramani v. Kumudbandhu*, 14 C.W.N. 924 (926). For the meaning of the term "plaintiff," see *Haji Bibi v. Sultan Mahamed*, 10 Bom L.R. 827.

Defendant:—The mere citing of a person does not make him a defendant. The case must be contentious and he must appear to oppose the grant; vide also sec. 286; *Abhoy Charan v. Saroja Sundari*, 41 Cal., 819 : 24 I.C. 27.

Forma Pauperis:—Vide *Re Dawubai*, 18 Bom, 287; *Re Guruchurn*, 6 C.W.N. cxii; also notes at p. 506, ante.

Procedure where caveator sets up a subsequent will and avers that it revoked the earlier will wanted to be probated:—In such a case the proper procedure for the caveator would be to start a fresh probate proceeding on the basis of the subsequent will and have the two proceedings amalgamated and heard together. Such a procedure is convenient except when the second proceeding cannot be fully pursued; for example, when the subsequent will is challenged as having been revoked. *Usharani Roy v. Hemlata Roy*, 49 C.W.N. 823 = A.I.R. 1946 Cal. 40-224 I.C. 873. The cavaror setting up a rival will can ask for joinder of issues on his counter-claim, *Venidas Nemchand v. Bai Chamrabai*, 58 Bom. 829 = 31 Bom. L.R. 1014 = A.I.R. 1930 Bom. 29 = 122 I.C. 126.

Right to ask for better particulars:—Such right subsists when the plea in defence is simply forgery, and manufacture or concoction. *Nathuram v. Sm. Deva*, 1960 M.P. L.J. 201 (notes); read (1888) 39 Ch. D. 693; A.I.R. 1938 Nag. 391; A.I.R. 1945 P.C. 7; 1951 S.C.J. 418; A.I.R. 1951 S.C. 280.

Addition of Parties:—See *Saroda v. Gobinda*, 12 C.L.J. 91. It seems that all persons claiming interest within the meaning of sec. 283, can be made parties to the proceeding, vide notes under that section.

Subject matter of the Suit:—Will be the testator's estate, *Re Hajikhan*, 18 Bom, 287. Where a *valorem* pleader's fees are allowed, the amount should be calculated with reference to the value of the estate, vide 6 C.L.J. 458 (*infra*). Read the notes under the heading, "Valuation in appeal" at p. 600, ante. Cf. A.I.B. 1963 All. 158 (F.B.).

Issue in a Probate Proceeding: Question of Title:—The Probate Court decides only the questions of genuineness of the will and representation to the

Estate. Therefore, such questions as relating to title or the testator's power of disposition are foreign to a probate proceeding, see *Hormusji v. Bai Dhanbaiji*, 12 Bom., 164; also *Madhusudan v. Jagadindra*, 20 C.L.J. 307, 27 I.C. 24; *Ochavaram v. Dolatram*, 28 Bom., 644; *Ralph v. Hale*, 7 P.R. 1902; *Barat Parsotam v. Bai Muli*, 18 Bom., 749 and other cases at pp. 408, 419, 433, ante. The Probate Court being concerned only with the proof of the due execution of jurisdiction and func. the will has no jurisdiction to go into the question of the function of Probate Court. validity of the provisions thereof with reference to Hindu Law, *Mt. Laxmi Devi v. Jagatambha Devi*, 38 P.L.R. 803-A.I.R. 1936 Lah. 878-169 I.C. 656 The function of the Probate Court is to decide whether the will propounded is the last will of the testator and whether the applicant has the right to represent the estate and therefore it will have no jurisdiction to decide disputes over the title to the property, *Sowbhagammal v. Komalangi Ammal*, 54 M.L.J. 382-A.I.R. 1928 Mad. 803-107 I.C. 420; *Komalangi Ammal v. Sowbhagammal*, 54 Mad. 24-59 M.L.J. 529-1930 M.W.N. 965-A.I.R. 1931 Mad. 87-128 I.C. 476 Read also the notes under the heading, "Function of Probate Court" under sec. 266, ante, at p 506 Although the question of title is not a pertinent issue in a probate proceeding, and the Probate Court's decision on that point is not final, still the Court has to see whether the applicant has a *prima facie* right to found his claim, *Rego v. Rego*, 16 N.L.J. 86-A.I.R. 1933 Nag. 173-144 I.C. 322 A caveror in a probate proceeding cannot set up a rival will and ask for joinder of issues on his counter-claim under the will so set up, *Venidas Nomchand v. Bas Champabar*, 58 Bom. 829-31 Bom. L.B. 1014-A.I.R. 1930 Bom. 29-122 I.C. 126. The caveror's remedy will be the institution of a separate proceeding on the rival will, *Ibid.* According to the Calcutta Court, the caveror setting up a rival will should start a fresh proceeding on his own will and ask for amalgamation and analogous trial of the two proceedings, see *Usharan Roy v. Hemlata Roy*, 49 C.W.N. 829, *supra*. An issue on the question of the locus standi of the objector to contest the proceeding is a proper preliminary issue in the case. It would be wrong to frame such an issue after the examination of all the relevant witnesses, *Garib Shaw v. Patha Dasse*, 66 C.L.J. 337-A.I.R. 1938, Cal. 290-175 I.C. 920

Intervenor in Appeal:—A Court can in its discretion allow a person not a party to a probate proceeding, to intervene at the appellate stage, *Sarada v. Gobindo*, 12 C.L.J. 91. Cf. *Lindsay v. Lindsay*, L.R. 2 P. & D 459.

Rules and Circular Orders:—For the applicability of such rules and orders, *Vida Amner Chand v. Mohanund Bibi*, 6 C.L.J. 453, (456); *Baija Nath v. Sham Sundar*, 41 Cal., 687 : 18 C.L.J. 643 : 21 I.C. 402.

Costs:—If an application for probate is strongly opposed and the petitioner is put to very heavy and needless expense the Court has ample power to award

his estate, Sadhu Chorah v. Gangawar, 57 I.C. 799 (Pesh.). Appeals in Probate cases are first appeals and costs in it are taxed according to High Court Rules. *Mr. Bose v. Mrs. Judah*, I.L.B. (1957) 2 All. 260 = A.I.R. 1958 All. 672.

Pleaders' Fees :—Can be allowed according to the valuation of the estate, 6 O.L.J. 453 (186). The Judge has a discretion in the matter, *Ibid.* Cf. *Pratap Chandra v. Kali Bhanjan*, 4 C.W.N. 600. But in a later decision (*Bajnath Prasad v. Sham Sundar*, 41 Cal. 637; 18 O.L.J. 648; 22 I.C. 402), but decided without reference to 6 O.L.J. 453, it has been held that pleaders' fees are assessable as in a miscellaneous proceeding under Rule 42A, Ch. vi of the Rules and Circular Orders of the High Court, and not according to the valuation of the property.

Revocation Proceedings :—This section does not apply to Revocation proceedings to which sec. 268 applies, see *Protap Chandra v. Kali Bhanjan*, 4 C.W.N. 600; *Saroda v. Gobindo*, 12 O.L.J. 91. Cf. *Khirodamoyi v. Bagola Sundari*, 4 O.L.J. 492. Vide notes at p. 508, *supra*. The above rule is too broadly stated, and should be appreciated in the light of the decision of *Re Harendra Kista*, 5 C.W.N. 383; A.I.R. 1958 All. 149. Compare *Re Mohendra Narain*, 5 C.W.N. 377 and *Sheik Asim v. Chandranath*, 8 C.W.N. 748; for an application for revocation in *Forma pauperis*, see *Re Guruchurn*, 6 C.W.N. cxii, referring to 5 Cal., 819.

Revision :—*Vide Khetitromoni v. Shyama Churn*, 21 Cal. 539; *Kalimuddin v. Mahurmi*, 39 Cal. 569; 16 C.W.N. 662; 15 O.L.J. 332; 18 I.C. 690; *Brojonath v. Dasmons*, 2 O.L.R. 569; *Abhiram v. Gopal*, 17 Cal., 48; *Girindra Kumar v. Itageswari Roy*, 27 Cal. 5; Cf. also 19 C.W.N. 1169; 81 O.L.J. 81; *Ella Lavette v. E. A. Tabuni*, A.I.R. 1925 Pat. 328 = 6 P.L.T. 584 = 86 I.C. 92 [a grant of letters of administration to a minor can be set aside in revision].

Reference :—An order of the District Judge on an application for probate cannot be referred to the High Court under O.xvi, r. 1, though the High Court can entertain it as a Court of concurrent jurisdiction. *Manohar Mukerji*, 5 Cal., 758; Cf. *Ganesh v. Ramchandra*, 21 Bom., 569.

Review :—The Probate Court has power to review its own orders under O.xvii; see *Kyone Hoe v. Kyon Soon*, 3 Rang, 261; 91 I.C. 609; *Re Pitambar*, 5 Bom., 638 (641). Vide notes at p. 500, *ante*.

Effect of withdrawal :—The withdrawal of a probate application before it becomes contentious does not bar a second application for the purpose, *Pakiam v. Innesi Fernand*, 19 Mad., 456. For withdrawal of appeal, *vide Saroda v. Gobinda*, 12 O.L.J. 91.

Compromise:—*Vide* notes at p. 509 and 587 ante. See also *Saroda v. Gobinda*, 12 C.L.J. 91. The value of a compromise is very small in a probate proceeding, as it does not always do away with the necessity of formal proof of the "due execution" and genuineness of the will. *Vide Monmohini v. Banga Chandra*, 31 Cal., 367; *Kunjalal v. Karlas Chandra*, 14 C.W.N. 1068 : 7 I.C. 740; *Read Night v. Carter*, 8 Sw. & Tr. 421; *Janakbati v. Gajanand*, 20 C.W.N. 986 : 1 Pat. 887. 87 I.C. 12, *Sarada Prosad v. Triguna*, 8 Pat L.J. 415; *Chidambaram v. Krishnaswamy*, 28 M.L.J. 285 : 28 I.C. 221; *Bishunath Rai v. Sarju Rai*, 1981 A.I.R. 885—A.I.R. 1981 All 745—133 I.C. 403. A Probate Court is a Court of conscience and cannot be influenced by any agreement of parties. A compromise petition simply records the agreement between the parties to bind themselves by a certain fine of action, see *Carapet v. Derderian* A.I.R. 1961 Cal 359. Consult also (1960) 1 All. E.R. 689, A.I.R. 1986 P.C. 208; 41 C.W.N. 848, 48 C.W.N. 294; and *Santosh Kumar v. Gour Mohan*, A.I.R. 1969 Cal 291. Where the dispute in a probate proceeding is settled by a family arrangement recognising the will, the proper procedure would be to grant the probate after proof of the will in common form and the agreement recorded with the decree; so that the terms of the agreement might, if necessary, be enforced by suit. *Kamal Kumars v. Narendranath*, 9 C.L.J. 19. Compare *Surya Prasad v. Shyama Sundari* 14 C.W.N. 967, referred to in A.I.R. 1961 Cal. 359, *supra*. A family arrangement among the heirs can supersede even a probated will, and can have such effect even when it is verbal or oral, and such supersession can be enforced by means of a declaratory suit, *Gopal Chandra Adak v. Hari Mohan Adak*, 62 C.L.J. 386. As to whether an invalid will can be ratified by means of a family arrangement, see *Tar Singh v. Ram Saran*, A.I.R. 1928 Lah 499—110 I.C. 18. The grant of probate is a judgment *in rem* and binds even strangers. As the result arrived at by compromise has not the effect of the Court's decision, the decree based on such compromise cannot operate *in rem*. This is the underlying reason why compromises play comparatively such an insignificant part in a probate proceeding, though the Courts of justice are always anxious to give effect to all bona fide settlements of dispute by agreement of parties. With this essential principle in mind reference should be made to the following cases, *Wyisherley v. Andrews*, L.R. 2 P & D 327; *Retchma v. Malcolm*, (1902) L.R. 403; *Rawji Ranchod v. Vishnu*, 9 Bom., 241; *Ghollabhar v. Nandubai*, 21 Bom., 385, *Sarada v. Gobindo*, *supra*, *Priyanath Bhattacharya v. Saslabala Devi*, A.I.R. 1929 Pat. 385. As to the executor's power of compromising, read the notes under the heading, "Power of Compromise" under see. 307, post.

296. [Pro. S. 157 & Suc. S. 333] (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

N. B.—"This reproduces sec 388 of Act X of 1865 and sec. 157 of Act V of 1881 which are in identical terms. These sections were added in their respective Acts by section 17 of Act VI of 1889 and are obviously out of position in those Acts"—Notes on Clauses of the Original Bill

Surrender of Revoked Probate or Letters.—When a grant is revoked, the probate or the letters should be surrendered to the Court making the grant, and for this purpose the Court can issue citation upon the grantees. Where actual surrender cannot be compelled because of the grantees's absence from the country or of the documents being mislaid, the Court should revoke the grant without actual cancellation. In case of loss the Court can take an undertaking for delivery when the documents are found. see *Re Carr*, 1 Ew & Tr 111, *Barness v Vaughan*, 1 P. & D 728; *Baker v. Russel*, 1 Oas. Temp. Lec. 167. In the Original Side of the High Court, the revoked grant is delivered to the Registrar.

Sub-sec (2) —Provides the penalty for not surrendering the revoked grant under sub-section (1). It is fine up to Rs. 1,000, or imprisonment (of either description) for a maximum of 3 months or both

297. [Pro. S. 84 & Suc. S. 262] When a grant of probate or letters of administration is revoked, all payments made to any executor or administrator under such grant before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration may afterwards be granted might have lawfully made.

The Principle of the Section.—This section affords protection to debtors bona fide making payments to the grantees before the grant is revoked, vide *Allen v Dundas*, 9 T.R. 129 and the cases cited below. It also gives the grantees the right to be reimbursed in respect of all payments lawfully made by him, *Pundit Prayag Raj v Goukaran*, 6 C.W.N. 787; see also *Peckham's case*, (1488) *Plowden*, 282.

Payments to Executor or Administrator before Revocation.—So long as the grant is not revoked, the grantees represents the estate, and all payments

wants to him afford full indemnity to the persons so paying. *Ambica Churn v. Khaja Chandra*, 10 C.W.N. 422 (426); *Debendra v. Administrator General*, 85 Cal 955 (P.C.) 12 C.W.N. 802. A person is entitled to protection if he acts under the authority of a judicial act, *Allen v. Dundas, supra*; *Frosser v. Wagner*, 1 C.B.N.S. 214. *Vide* the notes under the heading, "Effect of Revocation," at p. 488, *supra*. The payments will not be protected unless *bona fide* made.

Sale under void grants:—There is some divergence of judicial opinion on the question of the effect of revocation of grant on the transactions of the outgoing grantees. According to one view, if the grant is simply *voidable*, subsequent revocation will not affect the transactions (such as sale, mortgage etc. by the grantees); but if it is *void ab initio*, the transactions are altogether invalid; *vide* the cases at p 488, *supra*; also *Grazebrook v. Fox*, (1666) 1 Plow. 274; *Abraham v. Cunningham*, (1677) 2 Lev. 182; *Woolley v. Clark*, (1822) 5 B. & Add. 744; But in the later decisions a more favourable view from the point of view of the *bona fide* transferee from the grantee for value without notice has been taken, *see Boxall v. Boxall*, (1881) 27 Ch. D 220; *Hewson v. Shelley*, (cited at p 489); so it seems plausible that even when the grant is vitiated by fraud, the person who takes a transfer from the outgoing grantee, if not himself participating in the fraud, will get protection inasmuch as he acts under the authority and colour of a judicial act. Cf. *Debendranath v. Administrator-General*, 85 I.A. 109 · 85 Cal. 955 12 C.W.N. 802 (P.C.); *Gopaldas's case*, cited at p 488. All the cases old and new have been fully considered by Mookerjee J. in *Sarlaia Prosad v. Jadunath* 19 C.W.N. 240 · 27 I.C. 715, which please see. *Vide* also the notes at p. 482, *supra*.

Grant set aside on Appeal:—According to some view if the grant is set aside on appeal, all intermediate acts (such as sale etc.) of the grantee fail to the ground. In this respect reversal of grant on *appeal* differs from that on revocation, the reason being that the appeal wipes off or suspends the grant, while in the other case, the grant remains in tact until revocation. See *William's On Executors*, 11th Ed. p. 473. In this respect the position of an auction purchaser, ~~and~~ the reversal of the decree, in execution whereof he purchases, may be considered as furnishing an analogy. For the cases relating to the fate of such an auction purchaser, *vide Sagore Mandal v. Moffjaddin*, 24 C.W.N. 60; *Satis v. Rameswari*, 20 C.W.N. 665; *Abdul Rahaman v. Sarafat Ali*, 20 C.W.N. 667; *Sheik Ismail v. Bayab*, 30 Mad., 295.

298. [Pro. S. 85] Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Muhammadan, Buddhist or exempted person, or a Hindu, Sikh or Jaina to whom section 57 does not apply, be in the discretion of the Court to make an order refusing, for Power to refuse letters of administration.

reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

Power to refuse Letters:—This section gives the Court a discretion to refuse grant of letters of administration in respect of the estate of a deceased person who was (a) a Muhammadan, or (b) a Buddhist, or (c) an exempted person, or (d) a Hindu, Sikh or Jaina, not subject to sec 57. The section authorises refusal of administration, but not of probate, *Tran Nath v. Jadonath*, 20 All. 189; Comp. *Chandratara Debi v. Shrish Chandra Bhattacharjee*, A.I.R. 1928 Cal. 277. So, it has been held that although it is within the discretion of the Court to refuse to grant an application for letters of administration, no such discretion has been given in regard to an application for probate, *Hoi Chand v. Natal Raz*, A.I.R. 1930 Sind, 91-121 I.C. 178. It has, likewise, been held that the Court cannot refuse grant of probate on the ground of the alleged incompetency of an executor, *Hara Cocmar v. Doorgamoni*, 21 Cal., 195. But in exercising a discretion under this section the Court is to record its reasons in writing so that it may be scrutinised by the appellate Court. Administration *cum testamento annexo* is on the same footing as probate, and does not come within the meaning of the section. Compare the notes under sec. 293, *supra*. Therefore, letters of administration with the will annexed can ordinarily be refused only on the grounds on which a probate can be refused; for instance, on the ground of want of due execution, testamentary capacity and so forth, *Babu Misra v. Umer Persad*, 110 P.W.R. 1918: 45 I.C. 974. The necessity of administration, or its absence has, however, some bearing on the question whether the Court should accede to the prayer for grant of letters of administration, *Chandratara Debi v. Shresh Chandra Bhattacharjee*, A.I.R. 1928 Cal 277, cited at p. 377 ante. Where a will has been satisfactorily proved by convincing evidence, a grant should not be refused simply because the will is unnatural, *Rajani Kanta v. Uma Sundare*, cited at p. 543, ante. Comp. A.I.R. 1968 Pat. 342.

299. [Pro. S. 86 & Suc. S. 263] Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.

"Every Order."—The expression does not mean any and every order of the Court. In order to be appealable, the order must be made by virtue of the powers conferred by this Act. *Ngwe Emon v. Ma Po*, 6 Bur. L.T. 87, 20 I.C. 281; *Narain v. Soudamini*, 11 C.W.N. ccvi (211); *Shib Det v. Devindar*, 123 P.L.R. 1910: 70 P.R. 1910: 94 P.W.R. 1910, 7 I.C. 710. As to the meaning of the word "hereby" vide *infra*. As to whether an order under section 292 will be appealable on the above ground, read the cases at p. 567, and also read *U Po Hnse v. Maung Bu Gyi*, A.I.R. 1929 Bang. 109-118 I.C. 401. The words "in accordance with the

provisions of" have been substituted for the words "under the rules contained in" occurring in both the Acts of 1881 and 1865. It was held under these Acts that the expression "every order" was controlled by the words "under the rules etc.", *Brijanath v. Dasmony*, 2 C.L.R. 589 (691) and therefore an appeal was possible only in cases where there could be an appeal under the C.P. Code, see *Khettramoni Dasari v. Shyama Churn*, 21 Cal., 589. This was obviously a very forced interpretation, but was resorted to for the purpose of obviating the absurdity of making every order of the Probate Court appealable. The point was however concluded by judicial precedent and all possible controversies were consequently stifled. But the Legislature, though purporting to make a mere verbal amendment, have unwittingly treaded on a very dangerous ground in introducing the alteration. The present phraseology warrants the contention that the words "in accordance etc." go with the word appeal providing for the procedure to be followed for it and have no reference to the appealability of the order. Cf *Sarat Chandra v. Benoda Kumari*, 20 C.W.N. 28 : 33 I.C. 148. The real test of appealability will be whether the order has been made by the District Judge by virtue of the powers conferred by the Act and not whether it is appealable under the C.P. Code. So it has been said that the word "order" in this section is not an order of that limited scope as is contemplated by O. xiii, r. 1. *Sherk Azim v. Chandra Nath*, 8 C.W.N. 748 ; *Rajani v. Debendra*, 8 C.W.N. 208 ; and that the section does not mean that those orders only which are appealable under the C.P. Code can be appealed from, *Shahaluddin v. Fazal*, 52 P.R. 1902 : 89 P.L.R. 1902. Cf 4 O.C. 84 (86); also 21 Cal. 689 and 20 C.W.N. 28 (*supra*). The Bombay Court has apparently in conformity with the opinion expressed herein, construed this section as it now stands as meaning that every order made by a District Judge by virtue of the powers conferred upon him by the Act is subject to appeal and that the rules of procedure for the appeal will be as under the C.P. Code, and as not meaning that the right of appeal is conceded only in relation to the orders appealable under the C.P. Code, *Fakirji Navroji v. Maherban Fareedoon*, 44 Bom. L.R. 603 = A.I.R. 1942 Bom. 276 = 202 I.C. 683. As to what orders are or are not appealable *vide infra*. Compare the cases which have held that every order in an execution proceeding is not appealable, e.g. *Jogesh v. Debendra*, 35 C.L.J. 170 ; *Deoki v. Bansri*, 14 C.L.J. 85 : 16 C.W.N. 124, and so on. The word "Order" generally implies an adjudication of the rights of the parties and a direction to be carried out by them. Both these things are wanting when the Court decides to go on with the proceeding under sec 271 ; therefore there is no appeal under that section ; read the notes at p. 616, under the heading, "Appeal".

District Judge :—It is the order of the District Judge that has been made appealable under this section. An order by a senior sub-Judge invested with the powers of District Judge for the grant of letters of administration is covered by the section, *Mt. Laxo Devi v. Jagadambha Devi*, 88 P.L.R. 809 = A.I.R. 1936 Lah.

878 - 163 I.C. 656. Comp A.I.R 1952 Cal. 20. As to the position of the Assistant Judges of Bombay, vide the notes under the next heading. As to the position of subordinate Judges to whom cases are transferred by the District Judges, read the notes under the heading, "Forum of appeal when proceedings are transferred by District Judge to subordinate Judge" at p. 584, *post*. Also *Jadutala Dasi v. Upendra Nath*, A.I.R. 1948 Cal 255. As to the meaning of the expression "District Judge" read the notes at p. 508, *ante*; also those under sec. 2(bb) at p. 9, *ante*.

Assistant Judges of Bombay:—Under the Bombay Civil Courts Act (XIV of 1869), if the subject matter does not exceed Rs. 5,000, an appeal against the order of an Assistant Judge lies to the District Court, and not to the High Court, *Laxmi v. Aba*, 92 Bom., 684. Where the total value of the properties, irrespective of the value of the applicant's share, exceeds Rs. 5000/-, the appeal will lie direct to the High Court, *Ramgopal v. Jatunbari*, 57 Bom. 143 - 94 Bom. L.R. 1677 = A.I.R. 1933 Bom. 71 - 141 I.C. 595.

Which Parties can appeal:—All parties whose claim or objection has been run down can appeal irrespective of the question whether or not he has come in by way of a formal *Caveat*, *Sajan Das v. Chetan*, A.I.R. 1955 Ajmer, 38. A party whose attempted intervention to contest a probate proceeding has been disallowed by the Court will have a right of appeal against the final grant, although he had not appealed against the order disallowing his intervention, *Sm. Malati De v. Dhanapats Dutta*, 66, C.W.N. 879 [this decision is correct except that it has wrongly used the term *Caveat* to indicate an objection ranking like a written statement].

Orders appealable:—Every order passed under this Act (*vide post*) will be appealable whether interlocutory or final, *Cheda Lal v. Ram Dulari* 7 O.W.N. 616 = A.I.R. 1930 Oudh. 424. An order granting or refusing probate or administration is a decree and is appealable as such, *Eva M. Stephens v. Orme*, 85 All. 448 : 22 I.C. 98 ; *Arthur Lane v. Hidayatulla*, 1895 A.W.N. 127] ; although the objector to the grant has been held to have no *locus standi*, and although the interlocutory order ruling the objector out of Court for want of *locus standi* would not have been appealable, *Nalnn Chandra Guha v. Nebarau Chandra Biswas* 59 Cal. 1808 = 8 C.W.N. 685 = A.I.R. 1932 Cal. 784 - 140 I.C. 54. An order may be appealable hereunder irrespective of whether it is a decree or not, *Sarat Chandra v. Bencda Kumari*, 20 C.W.N. 28 ; 83 I.C. 143. An order calling upon the executor to pay the difference between the duties calculated at 2 p.c. and 8 p.c. respectively is appealable, as the order is in effect a refusal to make a grant, *Suarnameyi v. Secretary of State*, 48 Cal. 625 : 22 O.L.J. 870 - 20 C.W.N. 472 : 30 I.C. 394. An order revoking probate for failure to furnish security is appealable, *Shabuddin v. Fazal Din*, 52 P.R. 1902 : 89 P.L.R. 1902. Cf. 47 Cal 115. An order dismissing an application for revocation on the ground of want of interest is appealable, *Sheikh Asim v. Chandranath*, 8 C.W.N. 748. So is an order admitting a person as *Caveator* under

sec. 288, *Abhiram Das v. Gopal Das*, 17 Cal. 48. [N.B.—This case was decided with reference to sec. 588 (2) of the C. P. Code of 1882, which finds no place in O. xliv, r. 1 of the present Code; now, therefore, there is no appeal where the Judge decides that a person has *locus standi* to contest a will, *Lakhi Narain v. Multan Chand*, 17 C.L.J. 280 : 16 C.W.N. 1099 : 16 I.C. 686]. So is an order under sec. 307, *infra*. *Umacharan v. Mukhtkeshi*, 28 Cal. 149 : 9 C.W.N. 443. An appeal lies from an order refusing discharge to a surety, *Shahabuddin v. Fozal Din*, 52 P.R. 1802 ; 89 P.L.R. 1902. Vide also the notes under the heading, "Every Order," *supra*. So is an order refusing to stay issue of grant, *Brij Coomari v. Ramrak*, vide *infra*. An order granting probate on condition of security being furnished is appealable. *Dinen v. Emperor*, 40 P. L. R. 22—A.I.R. 1938 Lah. 167—177 I.C. 891. An order directing executor to furnish security is appealable. *Sri Ram v. Emperor*, I.L.R. (1939) Lah. 424—41 P.L.R. 768—A.I.R. 1940 Lah. 88—187 I.C. 93. An order granting remuneration for the preparation of a list of properties of the deceased seems to be appealable hereunder, *Madhavrao v. Nazir*, 2 Bom. L.R. 798. An order granting permission to an administrator to sell immovable property is appealable, *Haji Pu v. Tin Tin*, 2 Rang. 117 : A.I.R. 1924 Rang 237 : 80 I.C. 746. An order refusing to assign an administration bond is appealable hereunder, *Hari Baksh v. Sham Sundar*, A.I.R. 1936 Lah. 684—166 I.C. 115.

Copy of Decree with Memorandum:—This section read with O. xli, r. 1 and O. xliv, r. 2, C. P. Code, renders it necessary that a copy of the decree appealed from should be filed along with the memorandum of appeal, *Hem Chandra v. Jadab*, 16 C.L.J. 116 : 17 I.C. 99 ; *Gangabai v. Jankishin Das*, A.I.R. 1938 Sind 38—179 I.C. 284 (F.B.).

Letters Patent appeal:—An appeal lies under the Letters Patent from the decision of a single Judge in an appeal from the District Judge's order granting probate, *Umrao v. Brindaban*, 17 All. 475. An order made by a High Court Judge refusing to stay the issue of probate and the discharge of the Receiver appointed in a probate proceeding is a "judgment" within the meaning of clause 16 of the Letters Patent and is appealable, *Brij Coomares v. Ramrek*, 24 All. 18 : 6 C.W.N. 781 (P.C.).

Orders not appealable:—An order holding that a certain person has a *locus standi* to contest a will is an interlocutory order and no appeal lies from it, *Lakhi Narayan v. Multan Chand*, 17 C.L.J. 280 : 16 C.W.N. 1099 : 16 I.C. 686 : *Paresh Chandra v. Bidhu Bhushan*, I.L.R. (1955) 1 Cal. 429. Likewise, no appeal lies from an order rejecting an application to be made a party, *Abrurunnissa v. Komurunnissa*, 18 Cal. 100 ; *Karman Bibi v. Misri Lal*, 2 All. 904 ; there is no appeal from an order refusing a Caveator to oppose an application for probate on the ground that he has no *locus standi*, *Sri Proskhad v. Dulhin Genda*, 18 C.L.J.

§12. 22 I.C. 276, following *Khetramoni v. Shyama Churn*, 21 Cal. 589; *Indubala v. Panchumani*, 19 C.W.N. 1169 (1170) : 21 O.L.J. 292 : 28 I.C. 578; *Rudharaman v. Gopal Chandra*, 24 C.W.N. 816 : 81 O.L.J. 81 : 56 I.C. 122. *Nalin Ch. Guha v. Niharan Chandra Biswas*, 59 Cal. 1808-86 C.W.N. 685-A.I.R. 1932 Cal. 784-140 I.C. 54; *Manoranjan Addya v. Bijoy Kumar Addya*, A.I.R. 1936 Cal. 180. But see *Lakhi Narain's case, supra*, and notice this subtlety that the interlocutory order ruling out of Court a co-heir on the ground of absence of *locus standi* is not appealable, but the final order granting the probate will be appealable although the failure of the contestant of the grant was due to the fact that he had no *locus standi*. *Nabin Ch. Guha v. Niharan Ch. Biswas, supra*. It is always advisable for an objector ruled out of Court for want of *locus standi* to hold his soul in peace and to pounce upon his opponent when an actual grant is made in favour of the latter. For the Patna view with respect to this matter, see *Chotto Makton v. Lachmi Kuer*, 11 Pat. L.T. 219-A.I.R. 1930 Pat. 364. Where a probate is granted, but the case is re-opened at the objection of a co-heir and the probate is suspended, no appeal will lie from the order directing re-hearing and suspension of grant. *Brojonath v. Dasmony*, 2 O.L.R. 589 (591) — exercise of discretion under sec. 271 of the Act, does not constitute an appealable order, *Fakirji Navrji v. Maherban Faredoon*, 41 Bom. L.R. 609-A.I.R. 1942 Bom. 276-202 I.C. 639; read the notes under the heading, "Appeal" under sec. 271, *ante*; also *Lala Bhupendra Narain v. Ashtabhuja Ratan Kuer*, 1932 A.L.J. 418-A.I.R. 1932 All. 879-139 I.C. 186; *Bajnath Das v. Mahatab Ramdeo*, 1958 A.L.J. 815-A.I.R. 1958 All. 668. No appeal lies against the order which allows the acceptance of insufficient security under sec. 291, *Lucas v. Lucas*, 20 Cal. 245; nor against the order calling upon the executor to furnish security, *Rongim v. Debend-a*, 8 C.W.N. 505; *Monmohini Dassi v. Taramoni*, A.I.R. 1929 Cal. 783-125 I.C. 99. Cf. 47 Cal. 115; the order assigning an administration bond is not appealable, *Kalimuddin v. Mahurni*, 89 Cal. 568 : 16 O.L.J. 382 : 16 C.W.N. 662; nor is the order setting aside the dismissal for default, *Ngwe Hmon v. Ma Po*, 6 Bur. L.T. 87 : 7 L.B.R. 21-23 I.C. 281; nor the order refusing to amend a clerical error, *Khetramoni v. Shyama Charan, supra*; *Girindra v. Rajeswari*, 27 Cal., 6. Where the Judge decides by an order that he has jurisdiction to entertain an application for grant, there will be no appeal, *Shob Dit v. Devindar*, 123 P.L.R. 1910 : 70 P.R. 1910 ; 24 P.W.R. 1910 ; 7 I.C. 710—following *Mahatab Rai v. Kamanlal*, 51 P.R. 1899. As to the non-appealability of a summary order under secs. 192 and 209, read *Daljit Kaur v. Tarlok Singh*, A.I.R. 1958 All. 707, cited at p. 364 *ante*; *Bajnath Das v. Mahatab Ramdeo*, A.I.R. 1958 All. 678, *supra*. The determination of the value of the properties under sec. 19-H(4) of the Court-fees Act is final under sec. 19-H(7) of the Act and therefore no appeal lies against the same and this section cannot be invoked to lay an appeal because the determination of valuation was not under powers conferred by the Act, *G E Pusch v. Collector of Mysore*, 1943 A.L.W. 161.

"Hereby":—The word means "by the whole Act" and not merely "by this Chapter." Therefore, an order granting permission to the grantees to dispose of the property of the deceased under sec. 307 (in the next Chapter) is appealable. *Uma Charan v. Muktakshi*, 28 Cal. 149 : 3 C.W.N. 443, Cf. *Sarat Chandra v. Benode Kumari*, 20 C.W.N. 28 : 83 I.C. 143, *Haji Pu v. Tin Tin*, 2 Rang 117 : A.I.R. 1924 Rang 257 : 80 I.O. 746.

Appeal to Privy Council:—An order of the Recorder of Rangoon rejecting an application for probate is a final decree passed by him in the exercise of original civil jurisdiction. An appeal therefrom, where the estate is valued above Rs. 10,000, lies to the P.C., and not to the High Court. *Eusuf Hashem v. Fatima*, 24 Cal. 30—1 C.W.N. 8. An order of the High Court on appeal is not open to further appeal to the P.C. *Po Kin v. Ma Sein*, 12 Bur L.T. 87 : 51 I.C. 596 Cf. A.I.R. 1952 Cal 473

Revision:—*Vide* notes at p. 574, and the cases under the heading, "Orders not appealable," *supra*. The Patna Court has held that no revision (but an appeal) lies when an objector is ruled out of Court as having no locus standi. *Chotto Mahton v. Lacime Kuer*, 11 Pat. L.T. 219—A.I.R. 1980 Pat. 354

Orders under the O.P. Code:—This section contemplates only the orders passed under powers conferred by this Act. But orders may be passed also under the provisions of the O.P. Code which have been made applicable to proceedings hereunder and their appealability will be regulated by the O.P. Code. For instance an application for grant of probate may be dismissed for default and the application for its restoration may be dismissed under O. ix, r. 9 of the Code; then an appeal may be preferred under O. xliii, r. 1(c) of the O.P. Code: *Ruplal v. Manchar Lal*, 38 P.L.R. 973—A.I.R. 1936 Lah. 863—167 I.C. 526. On appeal from *Manchar Lal v. Ruplal* 38 P.L.R. 269—A.I.R. 1936 Lah. 712—164 I.C. 334 As to whether an order refusing to assign bond is, appealable on the footing that it is an order of the nature of that under sec. 145 of the O.P. Code, see *Hari Baksh v. Sham Sundar*, A.I.R. 1936 Lah. 684—166 I.C. 115.

Court Fees:—The Calcutta Court has held that the Court fees payable on a memorandum in a probate appeal is Rs. 2/- as on an application. The Rangoon Court is also of the same opinion. *Sulhan Khan v. Muhammad Yusuf*, 11 Rang 43—A.I.R. 1938 Rang 141—176 I.C. 366. If the order in question does not fall within the ambit of sec. 2(2) of the O.P. Code, it will be a mere order, and then no decree sheet has to be prepared and the Court fees to be paid would be as in a Miscellaneous Appeal. *Dival Dass v. Bhairav*, A.I.R. 1945 Pesh 22—219 I.C. 229 The Court fees on an appeal against an order refusing administration under Sch. II, will be as follows, the subject matter in dispute being not estimable at a money value:—Bengal, or Assam, Art 17 (vi)—

Rs. 15 : Bombay, Art. 17 (vii)—Rs. 15 ; Madras, Art 17-B—Rs. 10 ; Bihar and Orissa, Art. 17 (vi)—Rs. 15. See *Eva Mount Stephens v. Hunter Granville Orme*, 35 All., 448 : 22 I.C. 98. The determination of the value of the properties under sec. 19-H(4) of the Court-fees Act is final, *G E. Pusch v. Collector of Meerut*, 1943 A.L.W. 161.

Valuation in appeal:—Read the notes at p. 500, ante. The determination of the value of the properties under sec. 19-H(4) of the Court fees Act is final, read the notes under the last heading.

Irreconcilable Provisions:—If the provisions of the C. P. Code are inconsistent with this Act, the Code prevails, *Eusuf Hashim v. Fatima Bibi*. 24 Cal., 90 : 1 C.W.N. 8.

Forum of appeal when proceedings are transferred by District Judge to Subordinate Judge:—An order of the subordinate Judge in proceedings hereunder which have been transferred to him by the District Judge under the Civil Courts Act is appealable to the High Court. This is because the expression "subject to the rules applicable to title proceedings" in sec. 24 of the Beng. N.-W. Provinces and Assam Civil Courts Act include rules relating to appeals, *Baroda Delya v. Phutumani*, A.I.R. 1933 Pat. 276—145 I.C. 875 ; read also *Jadulala Das v. Upendra Nath Saha*, A.I.R. 1948 Cal. 255. Comp. A.I.R. 1952 Cal. 20. From a grant made by the Additional District Judge, an appeal lies to the High Court, *Shark Moonshi v. Imam Khan*, 1962 M.P.L.J. (notes) 123. Cf. A.I.R. 1924 Pat 593 ; 1951 S.C.J. 820 = A.I.R. 1951 = S.C. 217.

300. [Pro. S. 87 & Suc. S. 264] (1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(2) [Pro. S. 2] Except in cases to which section 57 applies no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay,** shall where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the official Gazette, authorised it so to do.

Concurrent Jurisdiction of High Court:—"High Court" here does not mean merely the Highest Court of appeal as defined in sec. (3) (2A) of the General Clauses Act, but also includes the High Court exercising Original jurisdiction.

Therefore, a Judge of the Original Side can exercise concurrent jurisdiction under this section. *Re Mukhendra Narain*, 5 C.W.N. 877; *Jnan Kumar Das v. Ram Kumar Das*, I.L.R. (1940) 1 Cal. 79 = 44 C.W.N. 258 = A.I.B. 1940 Cal. 264 = 188 I.C. 809. 'Concurrent jurisdiction' means that the High Court can entertain an application which falls within the jurisdiction of the District Judge; therefore, whether the property is situate within the original jurisdiction of the High Court or not will be immaterial. *Nagendrabala v. Kashipati*, 87 Cal. 224 : 5 I.C. 1003. Thus, in *Re Monohar Mukherji*, 5 Cal. 756 : 8 C.L.R. 228, when a reference was wrongly made to the High Court (p. 574), the High Court treated it as an original application (and not as a reference) by virtue of the powers hereby conferred. Cf. Calcutta Rule No. 740 which does not override this section 37 Cal. 224, *supra*.

Question of title cannot be agitated hereunder specially when administration is complete:—Read *Lal Singh v. Smt. Hera*, 1953 A. L. J. 201 = A. I. R. 1953 All 507.

Power of Mysore High Court under this Section:—Read *Gordon Frederic Muirhead, In re*, I L R 1957 Mys. 457 = A.I.R. 1959 Mys. 83 (F.B.).

Sub-sec (2): Proviso :—It 'embodies the provisions in that behalf in sec. 2 of Act V of 1881'—*Notes on Clauses of the Original Bill*. Under this sub-section, the concurrent jurisdiction of the High Court is barred, without a previous notification, conferring authority, of the Local Government, (1) in the case of Hindus, Muhammadan etc. (not subject to sec. 57, *supra*), and (2) over areas beyond the Presidency towns of Calcutta, Madras and Bombay and the province of Burma. So, Burma is expected to see the greatest application of this section. Notice, however, that the words "and the province of Burma" have now been omitted from the Act by the Adaptation Order, 1937 at the place marked by asterisks (**) in the section. Compare the notes under the heading, "Jurisdiction of District Judges" at p. 501, *ante*. As to where this sub-section will not apply, see *Raj Rani v. Raizada Moolraj*, 63 Punj. L.R. 906 = A.I.R. 1962 Punj. 62.

301. [Pro. S. 87A & Suc. S. 264A] The High Court may, on Removal of executor or application made to it, suspend, remove or dis- administrator and pro- charge any private executor or administrator and vision for successor. provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

Scope of the Section:—This is sec. 87A of the Probate Act and sec. 264A of the Succession Act, as introduced by the Repealing and Amending Act, 1919 (XVIII of 1919). It confers a special power on the High Court to remove or

discharge a private executor or administrator and to provide for a successor of the defunct executor or administrator and for the vesting of the property. *Magan Lal Parikhawala v. Samson Shalom*, 1938 A.L.J. 124 = A.I.R. 1938 All. 197 = 174 I.C. 890. Cf. *Ex parte Ameer Chand*, 29 Bom., 188. Also sec. 25 of Act III of 1918. The section has been held not to apply to a trustee appointed by will. *Patel v. Patel*, A.I.R. 1956 Sau 51. For the meaning of "High Court" vide notes under the preceding section. As the expression includes the High Court exercising original jurisdiction, an application for removing or discharging an executor under this section should be presented to the Judge in the Original Side exercising testamentary jurisdiction, *Jnan Kumar Das v. Ram Kumar Das*, I.L.R. (1940) 1 Cal. 79 = 44 C.W.N. 258 = A.I.R. 1940 Cal. 264 = 186 I.C. 302. The High Court can take action under this section only on the application of a party, of course, supported by an affidavit, and upon notice to the person to be removed as no one should be condemned unheard. Cf. *Satyendra v. Narendra*, 89 C.L.J. 279; *Sato Koer v. Gopal Sahu*, 84 Cal., 929; *Jagannath v. Mahesh*, 25 C.L.J. 149 (a case for removal of guardian), *Ajant v. Christien*, 17 C.W.N. 62, *Rajendra v. Atal Bihari*, 25 C.L.J. 466; *Ramnath v. Rudra Mahants*, 18 C.L.J. 142, also read the observations of Wills J. in *Cooper v. Wardsworth*, (1863) 14 C.B.N.S. 180 (190). The word "may" in the section shows, that it is discretionary with the Court to take or not to take action hereunder. Discretion always means a judicial and not an arbitrary discretion. Therefore, the Court should not refuse to entertain the application, without holding an enquiry or without giving the applicant an opportunity to make out his case. *Dhana Bakriyammal v. Thangavelu Mudaliar*, 50 Mad. 956 = 53 M.L.J. 641 = (1927) M.W.N. 754 = 26 L.W. 498 = A.I.R. 1927 Mad. 994 = 105 I.C. 782. This section applies only in relation to an executor. If a person though called an executor is not really so, this section will have no application in relation to him. *Sarnath Sanyal, In re*, 1949 A.L.J. 268 = A.I.R. 1949 All. 93. The section concerns itself only with the control of the private executors and administrators, who are mere *ephemeral* beings. It has got nothing to do with the cases where permanent trusts are created by will. Thus, where an application is made by the manager of a temple for the removal of the trustee of a permanent trust created for the temple by a will, though styled also an executor, it would not be a matter which could be agitated by means of a petition under this section. The proper procedure would be a proceeding under sec. 92 of the C.P. Code. *Magan Lal Parikhawala v. Samson Shalom*, 1938 A.L.J. 124 = A.I.R. 1938 All. 197 = 174 I.C. 890. If after the completion of the administration, the executor has to retain control over the estate in the interest of certain beneficiaries under the will he then functions not *qua* executor but as a trustee, and is not removable under this section but under sec. 71 of the Trust Act. *Sarnath Sanyal In re*, 1949 A.L.J. 268 = A.I.R. 1949 All. 93; *Suhasm Karrur v. Wealth Tax Officer*, 66 C.W.N. 176.

Discharge of administrator after full administration:—Such discharge is not in the contemplation of any of the sections of the Act and the Court has no power to make any order in that behalf. After full administration, the administrator can work out his own discharge by submitting his accounts and no formal order of the Court is necessary for that purpose. *Badal v. Kamal Kumar*, A.I.R. 1959 Cal 171.

Dismissal of a previous application hereunder when bars a subsequent one:—Where a previous application for removal of an executor under this section is dismissed, a subsequent application on the self same facts will not be maintainable in view of the doctrine of finality in litigation. A fresh application may, however, lie on new grounds. *Sarnath Sanyal, In re*, 1949 A.L.J. 968 = A.I.R. 1949 All 98.

Who can apply. Locus standi:—The High Court can be moved under this section only on the application of a party and not *suo motu*. Any person whose interest is likely to be affected by the continuance of the executorship will have *locus standi* to move an application hereunder. For the purpose of this section, it is not necessary that the intending applicant should have an *actual* interest in the testator's estate; even a *possible* interest will entitle him to move the High Court hereunder. *Sarnath Sanyal, In re, supra*.

Order hereunder if judgment under Patna Letters Patent:—It does not amount to judgment, *Basudeo v. Prayag Dutt*, A.I.R. 1963 Pat Pat. 69; OI. A.I.R. 1955 Pat. 66, 1958 S.C.J. 800 = A.I.R. 1963 S.C. 196.

Power of new person appointed hereunder:—When a new person is appointed hereunder and the deceased's estate is vested in him, he possesses all the powers that an owner of a legal estate does; thus, he has the right to sue on a promissory note in favour of the estate, although the same has not been endorsed and delivered over to him, read *Charan Das v. Sarat Ch. Ghose*, 7 Out. L.T. 77.

Remedy by motion and not by Suit:—The special jurisdiction which the Original Side of a High Court exercises hereunder for the removal of an executor should be on *motion* and the relief should not be sought by means of a regular suit. *Kavam Devi v. Radha Krishan*, 16 Lah. 975 = 37 P.L.R. 77 = A.I.R. 1985 Lah. 406 = 167 I.C. 69; but see sec. 9 of the C.P. Code.

302. [Pro. S. 87B & Suc. S. 264B] Where probate or letters of administration in respect of any estate has or Directions to executor or administrator. have been granted under this Act, the High Court may, on application made to it, give to the execu-

tor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

Both ss. 87B of the Act of 1881 and ss. 264B of the Act of 1865 were introduced by Act XVIII of 1919. *Vide* notes under the last two sections. Also ss. 28 of Act III of 1913. For authorities, consult the following cases, *Re Lakshmi Bai*, 12 Bom., 688; *Re Doveton's Trust*, 18 Mad., 448; *Re Brereton*, 7 Bom. 881. The power of giving directions contemplated by this section is possessed by the High Court only. The District Judge cannot give directions with reference to the property under this section after granting Letters. *Winscr v. Winsor*, 44 Bom., 682 (686); 22 Bom. L.R. 896; 57 I.C. 116. The section reproduces the English practice prevailing in the Court of Chancery, and the High Court becomes vested with a testamentary and intestate jurisdiction under ss. 34 of the Letters Patent, [*Provas Chandra v. Ashutosh Mukherji*, 56 Cal. 979—A.I.R. 1930 Cal. 258—122 I.C. 197; also *Akshay K. Ghose*, *In re*, A.I.R. 1949 Cal. 452]. Cf. ss. 48 of the Trustees' and Mortgagees' Powers Act. The section uses the word "directions" in contradistinction to "adjudication on or determination of questions". The term should be understood in its ordinary sense of instructions, rules of guidance and so on, *Akshay K. Ghose*, *In re*, A.I.R. 1949 Cal. 462. The power given by the section to the High Court to give directions corresponds to the power of the Court of Chancery in England under O 45, R. 3 of the Rules of the Supreme Court; so the High Court hereunder can direct any administrator to bring to Court the monies and securities in his hand, *Afsar Ana v. Prince*, A.I.R. 1945 Oudh, 82, C.I. 1960 M.P.L.J. (notes) 193. The Court's directions may relate to settlement of disputes between the executor and the legatees or between the legatees *inter se*, *Rend Vanama Akkayya v. Vanama Lakshamma*, 51 Mad. 849—55 M.L.J. 517—(1928) M.W.N. 170—27 L.W. 370—A.I.R. 1928 Mad. 356—110 I.C. 186, and not to the determination of any disputed question of title, *Provas Chandra v. Ashutosh Mukherji, sujra*. See also *Akshay K. Ghosh*, *In re*, *sujra*. The section being limited to the issue of directions to the executor or administrator relating to the management and administration of the deceased's estate, the Court ought not hereunder to embark upon investigations of disputes which can appropriately be dealt with only in a comprehensive title suit, *Sudhangshu Mohan Sarker v. Harish Chandra*, 20 Pat., L.T. 871—A.I.R. 1940 Pat. 194—188 I.C. 849. The only effect of the section is to enable the High Court to give directions on an originating summons and not to act as a bill collecting agency, *Ramamurthy v. President, A. C. Society*, A.I.R. 1955 Mad. 417, C.I. (1888) 88 C.b. D. 210; (1889) 41 C.b. D. 476. Where the administration is alive it is open to the heir of a legatee, dying during the pendency of the administration proceeding, to apply for directions on the administrator for payment of the legacy which passes to him under ss. 104 of the Act and no separate suit is necessary for the purpose, *Secretary of State v. Parijat Debi*, 60 Cal. 1185—87 C.W.N. 769—A.I.R. 1938 Cal. 841—150 I.C. 168, cited at p. 208, *ante*,—affirmed on appeal to

P.C., 40 C.W.N. 186—A.I.R. 1985 P.C. 208—159 I.C. 328 (P.C.). But all the same it should be remembered that the power of giving directions which the High Court possesses under this section is discretionary and is of a summary character and, therefore, where complicated questions of fact and law are involved the High Court would do well not to exercise the powers hereunder but to relegate the parties to a regular suit for settlement of their disputes. *Arya Pratishthi Sabha v. Om Prakash*, 85 P.L.R. 307—A.I.R. 1994 Lab. 190—148 I.C. 1010. Application hereunder cannot be used as a substitute for a regular suit relating to the estate or its administration, *Akshoy K Ghose In re*, A.I.R. 1949 Cal. 462. By virtue of this section, the Court has no power to give direction to the executor to maintain certain persons out of the estate, *Ibid.* The Court has also no power to give directions regarding the executor's remuneration, *Ibid.* An application to recover an annuity payable under a will is maintainable under this section and the rule of limitation governing such an application will be Art. 123 [now, Art. 106 of the new Limitation Act (XXXVI of 1963)] and not Art 120 of the Limitation Act, *Anands Prasad v. Dulhin Kishore Kuer*, A.I.R. 1940 Pat. 264—185 I.C. 626. The section applies if the direction to executor to sell property and divide sale proceeds among legatees remains uncarried out, *Quadios v. Quadios*, 30 Pat. 86—A.I.R. 1951 Pat. 206.

Ex parte order by suppression of fact:—An *ex parte* order obtained by an executor hereunder by suppression, concealment and misrepresentation of facts is liable to be set aside, *Akshoy Kumar Ghose, In re*, A.I.R. 1949 Cal. 462. In order to set aside such an order the High Court acts in the exercise of its inherent jurisdiction. It may also be pointed out here that such an order will necessarily not be *res judicata*, *Ibid.*

Appeals in Oudh:—An order under this section by a single Judge of High Court is not a decree and is not appealable under sec. 12 of the Oudh Courts Act. *Dwarkanath v. Raj Ranj*, (1944) O.A (C.C.) 264.

CHAPTER V.

OF EXECUTORS OF THEIR OWN WRONG.

303. [Suc. S. 265] A person who intermeddles with the estate of the deceased, or does any other act which Executor of his own belongs to the office of executor, while there is wrong. no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

Exceptions.—(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

Illustrations.

(i) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong [See *Thomson v. Harding*, 2 E. & B 630].

(ii) A, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(iii) A sue as executor of the deceased, not being such. He is an executor of his own wrong.

Application of the Chapter to Hindus &c.:—This section (as also the next one) was not incorporated in the repealed Hindu Wills Act or the Probate and Administration Act; so the framers of the original Bill added a section at the beginning of this Chapter in the following words, observing that it was necessary in view of the fact that the provisions of the Act of 1865 relating to executors *de son tort* were not included in the Act of 1881—"Nothing in this Chapter shall apply when the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person"—*Vide Notes on Clause 302 of the Original Bill*. But having regard to the numerous decisions (*Vide the next paragraph*) in which the principle of the law relating to executors *de son tort* was extended to the Hindus &c., the Joint Committee have omitted that section; they thus give their reason for the omission: "We have omitted this clause as the Chapter enunciates general principles of law which *suo vigore* (of their own force) apply to Hindus and other specified communities"—*Vide Joint Committee Report*.

Decisions extending the Principle to Hindus—There is nothing in Hindu law repugnant to the principle that makes a person an executor *de son tort* by reason of unauthorised intermediating with the estate of the deceased; therefore, the law relating to executor *de son tort* could be applied to the Hindus on the principles of justice, equity and good conscience. *Radhica Mihani v. K. S. Banerji*, 10 C.W.N.

586. *Vide also Narayansami v. Esa Abbayi*, 28 Mad., 851; *Magaluri v. Narayana*, 3 Mad., 859; *Kanakamma v. Venkataratnam*, 7 Mad., 586; *Parthasarathy v. Venkata-dri*, 46 Mad. 190 (280): 43 M.L.J. 486: *Suddasock v. Ram Chandra*, 17 Cal., 620; *Kshitish v. Radhees*, 85 Cal., 276: 12 C.W.N., 237; *Framji v. Adarji*, 18 Bom., 897; Cf. *Jogendra v. Emily Temple*, 2 Ind. Jur. N. S., 234; *Mohar Essada v. E. I. Co.*, 1 Tay & B. 290; *Roghonath v. Buddinath*. *Morten's Rep.* by Montrion, 309; *Prayag Kumari v. Shiva*, 42 C.L.J. 280 (464): A.I.R. 1926 Cal., 1.

Application of the Section:—In order to render this section applicable, (1) there must be an intermeddler with the estate, doing some act which properly belongs to the office of executor, and (2) there is no rightful executor or administrator *in existence*. Therefore, where the will is proved and administration granted, there is a *rightful representative in existence* and the intermeddler will not become executor *de son tort*, but will become liable only as a trespasser, the reason being that there is another personal representative against whom the creditors can proceed, *Anonymous*, 1 Falk 313; *Tomlin v. Beck*, 1 Turn & R. 498. So the intermeddling must necessarily be before any grant is made (*i.e.*, not only ordered but actually issued), *Navazhai v. Pestonji*, 21 Bom., 400. But the mere existence of a legal representative or heir,—who is neither rightful executor or administrator, will do. Therefore, the principle of 1 Falk 313 will not apply to the case of a Hindu who invariably dies leaving a legal representative. If it were not so, there could never be an executor *de son tort* in the case of Hindus, *Narayanswami v. Esa Abbayi*, *supra*. It is the existence of a *rightful* executor that bars the application of the section and makes the intermeddler only a trespasser, but the existence of an executor *de son tort* produces no such effect. Therefore where an executor *de son tort* makes over property to a second person, such second person by his dealing does not become an executor of his own wrong, see *Hill v. Curtis*, L.R. 1 Eq., 90, *Pauli v. Simpson*, (1846) 9 Q.B. 365, but see *Williams v. Heabs* L.R. 9 C.P. 177. A creditor receiving payment from an executor *de son tort*, does not himself become so, *Hursels v. Bird*, 65 L.T. 709. The intermeddling must be with deceased's estate; so the section will not apply to dealing with joint family property which cannot be said to be an estate of the deceased, *Ramaswami v. Veerappa Chetty*, 33 Mad., 423: 20 M.L.J. 308.

Executor de son tort:—An executor *de son tort* (*i.e.* an executor of his own wrong) is the person, who being neither an executor nor an administrator intermeddles with the estate of the deceased or does some act with respect thereto which could properly be done by an executor. Cf. *Williams On Executors*, 11th Ed. p 177. Even a very slight act of intermeddling will constitute a person an executor *de son tort*, *Ayes habai v. Ebrahim*, 32 Bom., 864; *Rogers v. Frank*, 1 Y & J. 402. Thus, using or selling or appropriating any part of the deceased's goods will make a person such an executor. *Vide Illus* (i) and the case cited therewith; *Swinburne*, Part IV, s. 23; *Pauli v. Simpson*, (1846) 9 Q.B. 365;

Padget v. Priest, 2 Term. Rept., 97. So killing the cattle of the deceased or demanding payment from his debtors will make a man an executor of his own wrong. *Magaluri v. Narayana*, 8 Mad. 359. *Vide* also the cases cited under the heading, "Decisions extending the principle to Hindus" at p. 680, *supra*. A legatee in possession of the deceased's estate or of some portion thereof and holding the same adversely to the widow or other legatees may be sued as an executor *de son tort*. *Papurbai v. Chhhermal Mulchand*, A.I.R. 1929 Sind 19-114 I.C. 105. But the mere taking away bricks from the kiln of the deceased, does not make the intermeddler an executor *de son tort*, if there is actual legal representative in existence, *Satya Banjan Roychoudhury v. Sarat Chandra Biswas*, 80 C.W.N. 565-A I.R. 1926 Cal. 825-96 I.C. 695. If a man being sued as an executor, defends the suit in that character, he will become an executor *de son tort*, *Sharland v. Mildon*, 5 Hare, 468; See Williams, p. 179. An administrator *pendente lite*, intermeddling with the estate after cessation of his office is an executor *de son tort* and may be sued as such, *Kshitish v. Radhika*, 35 Cal. 276 : 12 C.W.N. 297. An executor appointed by the will, when he intermeddles with the estate, can be compelled to take probate, *vide* at p. 440, but an executor *de son tort* cannot be compelled to take out administration, *Re Davis*, 4 Sw. & Tr. 213. Cf. notes under secs. 280 and 291. The lawful acts of an executor *de son tort* are binding on the estate, *Mountford v. Gibson*, 4 East. 454; *Buckly v. Barbar*, 6 Ex. 164. As to whether a guardian of a lunatic borrowing money after the lunatic's death, can be treated as an Executor *de son tort*, see *Rathiah v. Santhamma*, (1954) 2 M.L.J. (Andh.) 187-A I.R. 1954 Andhra, 15-relying on (1948) 1 M.L.J. 22-A I.R. 1949 Mad. 265. Legatees helping themselves to take unauthorised possession of their legacies are executors *de son tort*, *Natesa Sastri v. K. S. Sundaram Chettiar*, (1958) 1 M.L.J. 470-A.I.R. 1958 Mad. 629.

Administrator *de son tort*:—The Act does not contemplate an administrator *de son tort*. Cf. Walker & Elg, 311.

Wrong purged by Subsequent Grant:—If after an unauthorised dealing, the executor *de son tort* obtains grant of administration, the wrong will be purged and the transaction by him will be validated, *Hell v. Curlls*, *supra*; *Kenrick v. Burgess, Moor*, 126.

Quasi Executor *de son tort*:—If on the termination of his appointment, an administrator *pendente lite* continues to deal with the estate, he becomes what may be called a *quasi executor de son tort* and may be sued as such, *Khitish Chandra v. Radhika*, 3 Cal. 276 : 12 C.W.N. 297. Cf. *Magaluri's case*, *supra*.

The principle applies to Mahomedans:—When a Moslem heir entitled only to a share in the deceased's property, deals with it in excess of his share, he becomes an executor *de son tort* with respect thereto, see *Amir Dulhin v. Baijnath*, 21 Cal.,

311. referring to *Coote v. Whittington*, L.R. 16 Eq. 584; *Rayner v. Kohler*, L.R. 14 Eq. 262. But compare *Zainunnissa Begum v. Ali Khan*, 29 Bom. L.R. 434 = A.I.B. 1927 Bom. 887 = 192 I.C. 129.

Exceptions: What acts do not constitute Executor de son tort:—The section provides two exceptions to the general rule : (1) Intermeddling for the preservation of the estate or for funeral purposes of the deceased or for the deceased's family necessities does not make one an executor of his own wrong. (2) Dealing in ordinary course of business with the deceased's goods received from another, likewise makes no executor de son tort. Cf. Williams On Executors, 11th Ed., p. 181; also *In re Eliza Martin*, 62 Cal. 120 = A. I. R. 1886 Cal. 511 = 187 I.C. 986. Dealing with the deceased's estate on a mistaken belief that the property is a man's own property does not make him liable as an executor de son tort; nor does the dealing as an agent of the rightful executor, *Sykes v. Sykes*, L.R. 5 C.P. 113; *Hall v. Elliott, Peake* N.P.C. 87; nor does a dealing under a colour of title, *Flemings v. Jarrett*, 1 Esp. N.P. 395; nor does a bona fide purchase of some goods from the representative of the deceased make the purchaser liable to be sued as an executor de son tort, *Seshayya v. Subbaji*, 6 M.L.J. 186.

Illus. (i): Takes to satisfy his own debt:—Where the surety of a deceased debtor, paid off a certain debt due from the deceased, and carried away certain goods belonging to the deceased, it was held that such seizure of goods was equivalent to payment of his own debt within the meaning of this illustration, *Narayan Sami v. Esa Abbasi*, 28 Mad. 351.

304. [Sect. S. 266] When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.

The Section, if exhaustive:—The section is not exhaustive. It deals with some of the liabilities but not all, of an executor de son tort, *Prayag Kumari v. Shiva Prosad*, 42 C.L.J. 280 (665).

Liability of Executor de son tort:—The Executor de son tort has all the liabilities of a rightful Executor but has not all his privileges, *Rayner v. Kohler*, L.R. 14 Eq. 262; *Padget v. Priest*, 2 Term Rept. 97; *Coote v. Whittington*, L.R. 16 Eq. 584; Williams on Executors, 11th Ed. p. 184; but see *Cory v. Hills*, L.R. 15 Eq. 79. He is therefore liable to account to the lawful executor or administrator, *Ibid*; and the administrator can maintain a suit for accounts against him.

under this section, *Harry Percival Robson v. Administrator-General, Punjab*, 11 Lab. 825-30 Punj L.R. 503-A.I.R. 1929 Lah 768-192 I.C. 467. He is liable even to the creditor or the legatee of the deceased Cf. *Carmichael v. Carmichael*, 2 Phili. O.C. 108, *Narayanasami v. Esa Abbasi*, 28 Mad. 351; *Ratanbas v. Narayan Das*, 61 Bom. 771-29 Bom. L.R. 905-A.I.R. 1927 Bom. 474-104 I.C. 794 [Intermeddling heirs liable to the deceased's mortgagee]; *Chintamoni v. Sadguru*, A.I.R. 1956 Bom. 553. But he is liable only to the extent of the assets coming to his hands, after deducting the lawful payments made by him, see *Croft v. Whittington*, *supra*; 6 M.L.T. 362 (*infra*). Vide also *Williams on Executors*, 11th Ed., p. 185. Cf. *Hill v. Curtis*, L.R. 1 Eq. 908, 6 M.L.T. 362 (*infra*). If he has mingled up his own property with the assets of the deceased and if the two cannot be separated, the whole fund can be seized, *Magalur v. Narayana*, 3 Mad. 360. He has protection for all lawful acts necessary for the estate, *Williams*, p. 185. Acts done, or payments made, by him *in due course of administration*, that is such acts or payments as the rightful executor himself would have done would be protected under this section, *Buckley v. Barler*, 6 Exch. 164, *Padgett v. Priest*, *supra*; *Graysbrook v. Fox*, Plowd. 282; *Fyson v. Chambers*, 9 M & W 468; and he is entitled to plead such acts and payments in mitigation of damages, *Mounford v. Gibson*, 4 East, 451 (454). But it is not open to him to plead *plene administratur*, (a plea of full exhaustion of assets in course of administration) if he retains the assets for his own use or satisfies his own debts, *Narayanaswami v. Esa Abbasi*, 28 Mad. 351, *supra*. According to the Madras Court, if the retention of assets for self benefit or payment towards his own debt is not disproportionate to what he is entitled, law will not ask him to make any refund. Where the payments of the testator's debts including the debt due to the executor *de son tort* himself are reasonably paid by him, the payments will all be regarded as made "in due course of administration" and no question of refund to the unpaid creditor by him will arise, *Seshiah v. Ramiah*, (1989) 1 M.L.J. 742-(1989) M.W.N. 405-A.I.R. 1989 Mad. 682-184 I.C. 843. There is no right of suit as between the different executors *de son tort inter se*, without obtaining a grant from the Court, *Framji v. Adarji*, 18 Bom. 337, and the notes at p. 372.

This section is a special provision and qualifies sec. 212 of the Act, along with which it should be read. A case which falls within the purview of this section will not be hit by said sec. 212, *Mrs Munroe v. Rodrigues*, A.I.R. 1940 Rang 178-190 I.C. 527.

Liability of Executor *de son tort* when ceases:—Such executor gets no discharge unless he makes over the property and accounts to the rightful representative, *before* an action is brought and not *after*, *Hill v. Curtis*, L.R. 1 Eq. 90. His liabilities last so long as he continues dealing with the estate, *Damodar v. Dayab*, 11 Bom. L.R. 1187.

Parties to suit against Executor *de son tort*:—The legal representatives of the deceased are not necessary parties in an action against the executor *de son tort* by the legatee if such wrongful executor has taken possession of all the assets of the deceased, but if he has taken possession only of a part of the estate, they will be necessary parties, *Parthasarathy v. Venkataadri*, 46 Mad. 180 (284, 285).

Onus:—The onus is on the executor *de son tort* to prove in a suit against him by a creditor of the deceased that he did not receive so much property as would satisfy the plaintiff creditor, *Hava Bhagi v. Saibet*; 6 M.L.T. 362. Cf. *Magaluri v. Narayana*, *supra*.

CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

305. [Pro. S. 88 & Suc. S. 267] An executor or administrator

In respect of causes of action surviving deceased and debts due at death. has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

N.B.—"The wording of sec 88 of the Act of 1881 has been adopted. It is mere in consonance with the language of the Indian draftsman and involves no change of substance."—*Notes on Clauses of the Original Bill*.

Power of Executor or Administrator:—An executor or administrator possesses the same right as the deceased himself (if living) would have had, (1) in the matter of suing in respect of causes of action surviving the deceased, (2) for the recovery of the debts due to the deceased's estate; see *Birewar Ghose v. Shresh Chandra* 80 C.L.J. 180—49 C.W.N. 765—A.I.R. 1946 Cal. 298. This necessarily follows from the provisions of sec. 211, *supra*, by virtue whereof the executor or administrator becomes the legal representative of the deceased for all purposes, and the deceased's estate vests in him, and it is the duty of such executor or administrator to collect all the assets of the deceased, to pay his creditors, to discharge all the obligations and to distribute the residue among the legatees and heirs, *H. P. Robson v. Administrator-General, Punjab*, *infra*, tide the notes and cases at pp. 365-70, which are not repeated here. Vide also secs. 213, 221 and 227 and the notes thereunder. Under the English law the administrator represents only the personal estate of the intestate, and not the real estate which

strictly passes to the heir, but sec. 211 of the Act makes a departure from the English law in this respect and vests all descriptions of property of the intestate in the administrator (if any), *H. P. Robson v. Administrator-General, Punjab*, 30 P.L.R. 503—A.I.R. 1929 Lah. 753. For the powers of Executors and Administrators, read the "General notes" under sec. 807, *post*. The executor can institute a suit without obtaining a grant, but he cannot proceed to a decree without it, *Jam'seji v. Herjibhai*, 37 Bom., 158. Vide also the P.C. cases of *Chandra Kishore v. Pratanna Kumari*, and *Soona Mayna v. Soona Navena*, cited at p. 850, *supra*, and the other cases at pp. 379-80, *ante*. An administrator can agree to pay the time-barred debts of the deceased, and a transaction entered into by him for that purpose can be enforced against the assets of the deceased in his hands, *Pestonji v. Bai Meher Ali*, 30 Bom. L.R. 1407—A.I.R. 1928 Bom., 639—112 I.C. 740.

Position of Moslem Executor or Administrator:—Sec. 218 does not apply to him (see p. 381); nor does sec. 212. Therefore, taking out a grant is not compulsory for him, *vide* at pp. 371 & 381, *ante*. But under sec. 273, his representative character is established by a grant. He has also the powers conferred on him by this section. See *Kurrututain v. Abbas Hossein*, 33 Cal. 116; read also the notes under a similar heading at p. 371, *ante*.

Cause of Action:—The term has not been defined in this Act or in the O.P. Code, 1908. But it occurs in sec. 20, O. II, rr. 3-7, O. vii and therefore the cases thenceunder may be consulted with profit. Shortly stated, it means the right to bring an action, *Chandra Mohan v. Biswambar*, 1 B.L.R., O.O., 42. Lord Esher, M.B. defines it as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court". *Read v. Brown*, L.R. 22 Q.B.D. 128 (181); see also *Chandra Koer v. Pertab Singh*, 15 I.A. 166: 16 Cal., 98. It is composed of all the relevant matters of fact requisite to the establishment of the right which has been infringed. *De Souza v. Coles*, 3 M.H.C.R. 884; see also *Gobinda v. Peram Devi*, 12 Mad., 136; *Pattarary v. Andimula*, 5 M.H.C.R. 419; *Rajendra v. Sama*, 1 M.H.C.R. 486; *Ittapan v. Manavikrama*, 21 Mad., 153; *Ganga v. Ramasamy*, 25 Mad., 786; *Kalidhan v. Sit*, 11 C.L.R. 57 (62-70); *Salima v. Sheik Muhammad*, 18 All., 181; *Banki Behari v. Pekhi Ram*, 25 All., 48; *Deep Narain v. Dierlert*, 31 Cal., 274; *Mody v. Agitrai*, 29 Bom., 368; *Partabchand v. Joharmal*, 30 Bom. 167.

Procedure:—Under O. VII, r. 4, O.P. Code, 1908, when a person suea in a representative character he must show, not only, his interest in the subject-matter, but also the steps he has taken to attain to that character. Cf. O XXXI, C.P. Code.

"Survive the deceased":—*Vide* notes under the next section.

306. [Pro. S. 89 & Suc. S. 268] All demands whatsoever and

Demands and rights of action of or against deceased survive to and against executor or administrator.

all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators ; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party ; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Illustrations.

(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(ii) A sues for divorce. A dies. The cause of action does not survive to his representative.

The Section :—It says that all demands and rights of action in favour of or against a person *existing at the time of his death* survive to or against his executors, subject to two EXCEPTIONS : (1) causes of action for defamation, assault (as defined in the I. P. C.) or other personal injuries not causing death, do not survive ; (2) there is no such survival also where the relief becomes infructuous after the party's death. For an instance of personal injuries not causing death, *vide* illustration (i) ; as for an instance of the relief becoming infructuous, *vide* illustration (ii).

Exceptions. The words "prosecute or defend" and "in favour of or against" clearly show that the section covers the cases of both plaintiff and defendant. The word "prosecute" is not here used in the sense in which it is used in a criminal Court. Cf. 44 Mad. 417 : 65 I.C. 549 (*infra*). The expression "special proceeding" is not limited to proceedings in the nature of suits, but is wide enough to cover summary misfeasance proceedings under sec 235 of the Companies Act, *Official Liquidators v. Jugal Kishore*, I.L.R. (1939) All. 6-1938 A.L.J. 1002 = A.I.R. 1939 All. 1-180 I.C. 489. *Comp. People's Bank of Northern India Ltd. Hargopal*, A.I.R. 1936 Lah. 271=160 I.C. 769. The phrase "causes of action" points to the civil character of the action. *Ibid*. The heirs of the deceased are not included in the expression "executors and administrators", and a cause of action, therefore, does not hereunder survive to or against them, *Carsim & Sons v. Sera Bili*, 18 Rang 386 = A.I.R. 1936 Rang. 17-160 I.C. 716—relied on in *Arura Chalam v. Subramanian*, (1957) 2 M.L.J. 597 = A.I.R. 1958 Mad. 142 ; *Official Liquidators v. Jugal Kishore*,

in India only so far as it has found expression in this section and in the Legal Representatives' Suits Act of 1855. For causes of action outside the maxim, read *Birswar Ghose v. Srish Chandra*, 80 C.L.J. 180—49 C.W.N. 766—A.I.R. 1946 Cal. 299. For exceptions to the rule as envisaged by the said two statutes, vide the cases under the last paragraph. An executor cannot maintain actions for assault, battery, false imprisonment, libel, slander and so forth, as falling within the exceptions Williams, p. 610; *Hatchard v. Mege*, 18 Q.B.D. 771. For actions for personal injuries, see *Pulling v. G. I. Ry Co.*, 9 Q.B.D. 110 (112); and the Indian cases cited under the heading "Personal Injuries" below. For executor's right under the Legal Representatives' Suits Act and Fatal Accidents Act, vide notes at p. 599, *supra*. A suit for possession of the person of a minor against a defendant does not survive against his widow or legal representatives on the defendant's death as it is in the nature of an *actio personalis*. *Sharifa v. Munikhan*, 26 Bom. 574. An action for deceit falls within the exceptions. Cf. *Peek v. Gurney*, L.R. 6 H.L. 877; *Re Duncan*, (1899) 1 Ch. 387.

Effect of decree against the Grantee:—The decree and the auction sale in execution thereof are binding on the estate, *Grace Rosamund v. Padmanatha*, (1914) M.W.N. 921. 1 L.W. 1033. 17 M.L.T. 18: 26 I.C. 369.

Personal injuries:—According to the Calcutta High Court, the expression means only *bodyly* or *physical* injuries, as opposed to injuries to property, credit or reputation, that is, only the injuries to the man's body or person and not to the man as a whole (including both his mind and body) are contemplated. Therefore, according to it, injuries caused by malicious prosecution will not be personal injuries, and a suit for damages for malicious prosecution will survive, *Krishna Behari v. Corporation of Calcutta*, 31 Cal. 993: 8 C.W.N. 745 (reversing 31 Cal., 406). According to the Rangoon Court also, the "personal injuries" are taken to mean *bodyly* or *physical* injuries as opposed to injuries to property or reputation, and are regarded as *ejusdem generis* with an assault and not with defamation. Therefore according to that Court a cause of action arising out of injury to a man's credit and reputation caused by the wrongful acts of the deceased defendant will survive against his executors and administrators, *Cassim & Sons v. Saro Bibi*, 13 Rang. 386—A.I.R. 1936 Rang. 17—160 I.C. 71b. The Allahabad view is somewhat akin to this, inasmuch as according to it cause of action for a pecuniary loss through deception of the deceased survives, *Dehra Dun Tramways Co. v. Hansraj*, 58 All. 342—A.I.R. 1925 All. 995—159 I.C. 977. The other High Courts differ from this view. According to them the expression covers *injuries* both to the mind and the *person* and therefore include injuries resulting from defamation, wrongful arrest, illegal detention, malicious prosecution and the like, with the result that there is no survival of the cause of action, in relation to any of them at all, *Haridas v. Ramdas*, 18 Bom., 677, *Sharifa v. Munikhan*, 26 Bom., 574; *Moti'ul v. Harnarayan*, 47 Bom., 716: A.I.R. 1923 Bom. 408: 25 Bom. L.R. 425;

Gadegi Marappa v. Marwadi, 20 M. L. T. 803; *Marwadi v. Somnaji*, 31 M. L. J. 722; *Bustomji v. Nurse*, 44 Mad. 357; *Gulabrao Ramchandra v. Deorao Krishna Rao*, 30 N.L.R. 186—A.I.R. 1934 Nag. 119—149 I.C. 1079; *People's Bank of Northern India v. D/o Raj*, A.I.R. 1935 Lah. 705—160 I.C. 759; *Punjab Singh v. Ram Autor*, 4 P.L.J. 676; (1920) Pat. 52 : 82 I.C. 348. That is, those Courts use the term "personal" in its ordinary sense and do not take it as equivalent to 'physical'. *Rutan Chand v. Municipal Committee, Herganghat*, 27 N.L.R. 287—A.I.R. 1931 Nag. 9—180 I.C. 86. According to the Madras Court, if in an appeal against dismissal of suit claiming special damages (being costs incurred in launching prosecution for alleged libel), the appellant dies, the cause of action does not survive to his legal representative, *Ayya Ramaswami Naicker v. Manicka Naicker*, (1944) 1 M.L.J. 415—1944 M.W.N. 459—A.I.R. 1944 Mad. 405. If a suit for malicious prosecution is decreed and damages are awarded, the whole complexion of the case changes, and the claim is merged in a decree. The rights and liabilities arising under the decree awarding damages for malicious prosecution continue, when the plaintiff dies during the pendency of an appeal against the decree, so far as the appeal is concerned, but as regards the cross-objections they abate, *Gulabrao Ram Chandra v. Deorao Krishna Rao*, 30 N.L.R. 186—A.I.R. 1934 Nag. 119—149 I.C. 1079; *Rutan Lal v. Babulal*, A.I.R. 1960 Madh. Pra. 200.

Criminal Prosecution:—The section does not apply to criminal proceedings, *U Tin Maung v. The King*, 1941 Rang. L.R. 224—A.I.R. 1941 Rang. 202—196 I.C. 54. The word "proceeding" refers to a "proceeding" in the nature of a suit, *Hazara v. Emp.*, 2 Lah. 27 (31). A.I.R. 1922 Lah. 227 : 59 I.C. 918. This case dissents (and rightly too) from *Ishar Das v. Emperor*, 10 P.R. 1908 : 7 Cr. L.J. 290, which held that the principle underlying this section could be extended to criminal prosecutions for *defamation*, on the reasoning that there are no great difference between a civil and a criminal action founded on *defamation*. It may be noted that where the complainant in a defamation case dies during the course of the trial, the Magistrate may, in the exercise of his discretion under sec. 259 of the Cr.P. Code, continue the trial and not discharge the accused, and this can be done, notwithstanding secs. 198 and 247 of the Cr. P. Code, and this sec. 306 will not affect the Magistrate's action, *U Tin Maung v. The King*, *supra*. The word "prosecute" is here used in the same sense as used in secs. 14 and 16 of the Limitation Act and not to imply a criminal prosecution. The phrase, "causes of action", which is unknown to criminal law points to the civil character of the action, *Ibrahim v. Shaik Dawood*, 44 Mad. 417 (419); 40 M.L.J. 351 : (1921) M.W.N. 227 : 65 I.C. 649.

Cases under Workman's Compensation Act:—Read (1958) 1 Andhra W.R. 316.

307. [Pro. S. 90 & Suc. S. 269] (1) *Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, of property, vested in him under section 211, either wholly or in part, in such manner as he may think fit.*

Illustrations.

(i) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(ii) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

(2) *If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely :—*

(i) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

(ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted—

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or
 (b) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.

- (3) Before any probate or letters of administration is or are granted *in such a case*, there shall be endorsed thereon or annexed thereto a copy of sub-section (1) and clauses (i) and (iii) of sub-section (2) or of sub-section (1) and clauses (ii) and (iii) of sub-section (2), as the case may be.
- (4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

General Notes.—The section gives the executor powers at least as extensive as those of an executor in England before 1926, *Geelaranees De v. Nanindra K. De*, 60 Cal. 394 = A.I.R. 1939 Cal. 429 = 144 I.C. 137. Executors are bound to carry out the directions of the will. It is unseemly on their part to obtain the probate of a will and then, instead of acting as ministers of the will of the testator, turn against his wishes and try to act in contravention of the directions of the testator, *Bal Krishna v. Vinayak*, 34 Bom. L.R. 118 = A.I.R. 1932 Bom. 191 = 189 I.C. 594. For the powers of an executor or administrator, read the notes at p. 695, *ante*. An executor stands in the position of a trustee for the parties beneficially entitled to the estate. His primary duty is to realise the assets and to administer the estate in the best possible way, *Mahomed Hussam v. Bai Arshabai*, 34 Bom. L.R. 1865 = A.I.R. 1932 Bom. 604 = 141 I.C. 734.

Sub-sec. (1) : Power of Disposition—This section gives a very wide power of disposition over the deceased's property to the executor or administrator, of course, subject to certain limitations in the case of Hindus etc (*vide* sub-sec 2). Cf. A.I.R. 1961 Cal. 411, *infra*. So he can dispose of the estate either wholly or in part by mortgage or sale as he thinks fit. *Seale v. Broun*, 1 All, 710 (F.B.); *Thorne v. Thorne*, (1893) 3 Ch. 196; *Andrew v. Weightly*, 4 Bro. C.C. 125; *McLeod v. Drummond*, cited *infra*, *Vane v. Rigden*, (1870) 5 Ch. App. 669. Obtaining of probate is not a condition precedent for the purpose, *Sonat Kumar v. Hem Chandra*, A.I.R. 1961 Oml. 411. One paramount principle should however be borne in mind. The executor or administrator does not possess an absolute power of disposition as an owner of a property does; he will have this power, subject to the limitations contemplated in the section, only if it is necessary for the purposes of administration, *Annadolantha Das v. Amleca Charan*, 47 C.L.J. 669 = A.I.R. 1928 Cal. 412 = 107 I.O. 747. It should also be remembered here that the power of disposition contemplated by the section is subject to the rule

of Bequestable Third under the Mahomedan Law, *Anarali Tarafdar v. Omar Ali*, 55 C.W.N. 88 = A.I.R. 1951 Cal. 7. The phrase, "power to dispose", includes any disposition by way of sale, mortgage, charge, exchange, lease and might also include a gift, *Eastern Mortgage & Agency Co v. Rebati Kumar*, 8 O.L.J. 260; *Ma Sein Bye v. Chetty Firm*, 3 Rang. 443 = A.I.R. 1926 Rang. 10 = 91 I.C. 668; *Jethibai v. Chotalal*, 34 Bom. 209; *Kul Hussain v. Ajodya*, 6 O.L.J. 526 = 54 I.C. 321. That gift is also included in the power is evident from sub sec. 2 (ii) (a), below. Vide also *Mead v. Orrery*, 3 Atk 289. This is the necessary legal consequence of the provisions of sec 211, *supra*. The discretion given to the executor or administrator hereby should not however be arbitrary, but be based on good reason *Marie Penheiro v. Jotindra*, 28 O.L.J. 141 = 47 I.C. 289. Cf *Manorama v. Kalicharan*, 31 Cal 166 = 8 C.W.N. 273. The discretion should be exercised having regard to the welfare of the beneficiaries, [Cf. *Nistarina v. Nundalal*, 30 Cal. 369 : 7 C.W.N. 369] as his position very much approximates to that of a trustee. Having regard to the provisions of sec. 96 of the Ind. Trusts Act and those of this section it seems that the executor has no power to grant a lease for ninety-nine years with an option to the lessee to purchase the reversion in the demised premises or in any part thereof at any time during the said period, *Mahomed Hussain v. Bai Aishabai*, 34 Bom. L.R. 1865 = A.I.R. 1932 Bom. 64 = 141 I.C. 734, *supra*; consult *Oceanic Steam Navigation Co. v. Southerlerry*, (1880) 16 Ch D 296. An executor giving security by deposit of testator's title deeds to one of his (testator's) creditors does not assume personal liability for the debt, *Jamshedji Jejeebhoy v. Sorabji Dymagi*, 67 I.A. 270 = 1.L.R. (1940) Bom. 534 = 42 Bom. L.R. 719 = 71 O.L.J. 459 = 44 C.W.N. 653 = 1.L.R. (1940) Kar (P.C.) 179 = 1940 M.W.N. 706 = (1940) 2 M.L.J. 126 = A.I.R. 1940 P.C. 75 = 187 I.C. 773 (P.C.). There may however be circumstances in the case which may render the executor in the above case liable for interest on the debt, *Ibid.* The word, "property", being used in this sub-section without any qualification must cover both moveable and immoveable property, *Seale v. Brown*, *supra*.

Position of Purchaser or Mortgagor:—The executor having complete authority to dispose of the property, the transferee acquires a perfect title, and is not required to see to the payment of the legacies or other charges, *Soleman v. Rihimtulla*, 6 Bom. L.R. 800; *Shri Beharilalji v. Bai Rayba*, 23 Bom. 242; *Ganapathi Iyer v. Sivamalai*, 86 Mad. 675 = 29 M.L.J. 306 : (1912) M.W.N 1112 : 17 I.C. 4; *Ahmed Shemal v. Sheikh Ahmed Omar*, 33 Bom. L.R. 1056 = A.J.R. 1931 Bom. 633 = 135 I.C. 817 (case of Mahomedan Executor). Thus, a bona fide purchaser may possibly have protection even when the disposition of property is not for purposes of administration, *Annadalanahu v. Amrica Charan*, 47 O.L.J. 569 = A.I.R. 1928 Cal 412 = 107 I.C. 747. It is not necessary for him to see to the application of the purchase money or the necessity of the transaction, *Greender v. Mackintosh*, 4 Cal. 897; *Umaiyi v. Janaki*, 1 I.C. 248 (Cal); *McLeod v. Drummond* 17 Ves., 164; *Sectt v. Tyler*, 2 Dick., 726; or to see whether the

debts have been paid, or whether any debts exist at all, *Rooplal v. Makima*, 10 B.L.R. 271 (N.). Also *vide infra*, under the heading, "Effect of Permission." But the position may be different where there are special circumstances necessitating an enquiry by him into all these matters, 1 I.C. 248 (*supra*); for instance, where the executor is acting fraudulently and in breach of his trust, and the intending purchaser gets notice of the fact, 6 Bom. L.R. 800 (*supra*); *Dcs v. Fallows*, 2 Cr & Jer. 481. Comp. *Imperial Bank of India, Madras v. Krishna Murthi*, 65 M.L.J. 471-A.I.R. 1933 Mad. 628-144 I.C. 479. The protection which a bona fide alienee without notice enjoys in consequence of the executor's wide power of disposition under this section is not available, where the alienation is made for purposes not binding on the estate (as for example when the executor makes the alienation for the purpose of paying off his personal debts) and the alienee has notice of the fact, *Namberumal Chetti v. Veerapprumal Pillai*, 69 M.L.J. 596-1931 M.W.N. 224-A.I.R. 1930 Mad 956-128 I.C. 689. A transferee with notice from an executor acting in fraud of the beneficiaries is never safe, *Re Verrell*, (1908) 1 Ch 65. The position becomes still worse if the transferee actively colludes with defrauding executor, *Rice v. Gordon*, 11 Beav., 265. So far as an intending lender to an executor is concerned, the section imposes no duty on him to enquire into facts outside the will as they existed immediately prior to the testator's death. Much of the usefulness of the statutory power conferred on the executor by this section would be nullified if we were to ascribe such a duty of enquiry in a person desiring to deal with an executor, *Sunil Kumar Kerr v. Sisir Kumar Kerr*, 67 I.A. 102-I.L.R. (1940) Kar (P.C.) 76-44 C.W.N. 289-(1940) 1 M.L.J. 795-1940 M.W.N. 137-42 Bom. L.R. 394-1940 A.L.J. 66-(1940) O.W.N. 35-42 P.L.R. 120-A.I.R. 1940 P.C. 30-186 I.C. 575 (P.C.).

The section affords a protection to the transferee only when he deals with the executor *qua* an executor and not *qua* an owner, *Geetarane De v. Narendra Krishna De*, 60 Cal 394-A.I.R. 1933 Cal 429-144 I.C. 197.

No power of disposition after general administration has been ordered:— After an order for general administration has been made, there is no power of disposition hereunder except without the sanction of the Court, *Wilson v. Kenmare*, (1943) 1 Ch. 415.

Sub-sec. (2): Restrictions in case of Hindus &c :—Under this sub-section, the general powers conferred by sub-sec. (1) are, in the case of Hindus, Mohammedans, Buddhists, Sikhs, Jainas and exempted persons, subject to the restrictions and conditions contemplated by the sub-clauses hereof. So, the position is that a Hindu executor can deal with the property of the testator in the same manner as the owner himself could have dealt with it, unless his powers are restricted or limited by the terms of the will. When his powers are restricted by the will, he can dispose of immoveable property only with the

permission of the Court, *Maneklal v. Keshav*, 89 Bom. L.R. 1094 = A.I.R. 1928 Bom. 71 = 178 I.C. 790. The operation of this sub-section is confined to immovable property only. "Sub-sec. (2) reproduces the provisions of sec. 9 of the Act of 1881, which were inserted in the Act by sec. 14 of Act VI of 1890"—Notes on *Causes of the Original Bill*. Before the Succession Act and Probate and Administration Act were fused into one statute, an interesting question would very often emerge out of the fact whether the letters were granted under one statute or the other; and a grant wrongly issued under one statute, while it should have been issued under the other one, would involve undesirable consequences unless altered into one under the right statute, see *Chettiar Firm v. Tan Ma*, 6 Rang. 411 = A.I.R. 1929 Rang. 5 = 112 I.C. 20.

Clause (i): Restrictions imposed by the Will:—The powers of an executor are very wide and can be restricted only by the conditions imposed by the will. So he can do any act under sub-sec. (1) if not forbidden by the will, *Ramdhone v. Sharfuddin*, 9 Bur. L.T. 236 : 34 I.C. 128 ; *Mithbhai v. Meherbai*, 23 Bom. L.R. 859. Cf. *Pram Krishna v. Sa'ibala*, 46 I.C. 852 (Cal.). Where the will gave the executor power to sell the property to pay off the testator's debts or if the property turned to be a losing concern, the executor was held to have power to mortgage the property in case of necessity, as there was no prohibition against mortgaging, *Purna Chandra v. Nobin*, 8 C.W.N. 362. But see *Zainab Bibi v. Chetty Firm*, 12 But. L.T. 109 : 51 I.C. 568 ; *Ramdhone v. Sharfuddin* *supra*. It has been held that an executor has power to mortgage the property of the testator unless prohibited by the terms of the will, 3 C.L.J. 260 (*supra*). Cf. also *Re Nundo Lall Mullick*, 23 Cal. 908 ; *Rajani v. Ramanath*, 3 C.W.N. 488 ; the case of *Kanta Chandra v. Kristo Churn*, 3 C.W.N. 515, is not really (though apparently) opposed to this view, as this question was not raised there. As to whether, the executor can exercise by attorney the power of sale given by Statute or by Will, see *Jogendra Chunder v. Apurna Das*, 18 C.W.N. 1190. Cf. *Re Dawson and Jenkins' Contract*, (1904) 2 Ch. 219. Where the will gives the power of sale for a limited purpose, the executor's power will be restricted accordingly, *Shri Beharlalji v. Bai Rajbai*, 23 Bom. 342. Where power of sale was given only in case of necessary transfer without proof of necessity would be bad, *Tika Ram v. Deputy Commissioner*, 26 I.A. 97 = 26 Cal. 707. Vids also the cases cited *supra*. According to some opinion a prohibition as to sale has been held to imply a prohibition as to mortgage also, as a mortgage ultimately culminates into a sale, *Krishnaswami Ayengar v. Gouriamma*, A.I.R. 1936 Mad. 256 = 168 I.C. 195. Where the testator directed that the executor was to mortgage the property to the Official Trustee of Bengal in order to pay a particular legacy, a mortgage in favour of some other person was held to be in contravention of the terms of the will, *Vaughan v. Heseltine*, 1 All. 753. Where there is a specific direction as regards the investment of the money mentioned in the testators' will, the administrator is not entitled to invest the money otherwise.

than as directed by the testator without the sanction of the Court, *Imperial Bank of India, Madras v. Krishna Murhi*, 65 M L J. 471—A.I.R. 1988 Mad. 628=144 I.C. 479. It should however be remembered that the terms of a will can impose restrictions as to right of alienation on the executor only *qua* executor. So, if the executor is also the residuary legatee, the testator cannot restrict his right of alienation in his capacity as such legatee, *Jagobondhu v Dwarika*, 28 Cal. 446. In absence of any restriction imposed by the will, the executor's power of disposition is unfettered, and he can dispose of the property even without a grant. *Mahomed Yusuf v. Hargovandas*, 47 Bom. 281; 24 Bom L R 763: A.I.R. 1922 Bom., 892. Cf. 36 Mad 575.

If the restrictions imposed by the will prove injurious to proper administration of the estate, the Court granting probate may remove the restrictions.

The Court granting probate can remove the restrictions and authorise alienation contrary to them, *Eastern Mortgage Agency & Co. v Rebati Kumar*, 3 C.L.J. 260. The executor need not ask permission of the Court except for removal of the restrictions imposed by the will, *Re Nundo Lal*, 28 Cal. 908, and the Court need not intervene in the administration by an executor except for the purpose of authorising contravention of the restrictions imposed by the will, *Re Indra Chandra*, 28 Cal 580. As to the Judge's power to remove the restrictions imposed by the will, read also *Maneklal v Keshav* 39 Bom. L R 1094—A.I.R. 1988 Bom 71—178 I.C. 790. Where there is no restriction, an application for permission is unnecessary, and may be regarded as without jurisdiction, *Re Indra Chandra*, 28 Cal 580. Cf *Ganapathi v Sivamalai*, 36 Mad 575: 28 M L J 306: (1912) M W.N 1112 = 17 I.C 4. The mere fact that the testator intended that the property should not be divided till the minor sons of the testator attained the age of 21 years does not amount to imposition of restrictions by the testator, *Ahmed Shemail v Sheikh Ahmed Omar*, 33 Bom. L R. 1056—A.I.R. 1981 Bom. 538—185 I.C 817. As to the question of restrictions with reference to a permanent lease, see *Satis Chandra v Jnanada*, 1 I.C 364 (Cal.)

N.B. —The restriction upon the powers of an executor to deal with immovable property may be either express or implied, *Maneklal v Keshav*, 39 Bom. L.R. 1094—A.I.R. 1988 Bom 71—178 I.C. 790.

Mahomedan Will:—For the right of alienation with respect to the estate of a deceased Mahomedan, see *Ramdhone v Sha'fuddin*, 9 Bur. L.T. 286 : 84 I.C. 128. For the position of a Mahomedan Executor, vide at pp 871 & 896, *ante*; also read the Bombay cases cited there, e.g. 102 I.C. 129; 135 I.C. 817.

Clause (ii): Administrator's power of Disposition: Permission of Court:—We have seen under clause (i) that the power of disposition of the executor is not dependent on the permission of Court except for the purpose of overriding the directions contained in the will, *Re Nundo Lal*, 28 Cal 908. Cf. *Mahomed Yusuf v. Hargovandas*, 47 Bom. 281: A.I.R. 1922 Bom., 892;

24 Bom. L.R. 753 The object of this clause is to enable the District Judge as the Court of testamentary jurisdiction to see that the transfer applied for is necessary in the interest of the administration of the estate, *Indrani, In re*, 53 All. 422-1981 A.L.J. 86-A.I.R. 1981 All 212-180 I.C. 498. In respect of the question, of dependency on the Court's permission for the purposes of an alienation, the executor is in a much better position than the administrator, *vide Rambhore v. Sharfuddin*, 9 Bur. L.T. 286 : 94 I.C. 128. The executor has not got to look to the Court unless his hands are tied down by the will, but administrator's power of disposition over immoveable property is absolutely dependent on the Court's permission; in absence of such

Who can apply for permission.

permission, the alienation is invalid and unavailable as against the other lawful claimants of the estate, *Laxmidas v. Ismail Gafur*, 28 Bom. L.R. 1262-A.I.R. 1927 Bom. 16-99 I.C. 482. Where a mortgage transaction by the administratrix becomes invalid for want of the necessary sanction, the defect will not be cured by the fact that the Court had on a previous occasion authorised a limited sale of the property, *Chandri v. Abdul*, 51 Bom. 16-28 Bom. L.R. 1860-A.I.R. 1927 Bom. 49-98 I.C. 916. Permission to alienate cannot be invoked by any other person than the executor (only on limited occasions) and the administrator, and the permission is necessary only for the purposes of proper administration of the estate, *vide Indra Chandra*, 28 Cal., 580; *Re Nurshingh*, 3 C.W.N. 635. The object of this clause is to enable the testamentary judge to see whether the proposed alienation for which permission is applied is necessary in the interest of the administration of the estate, *In re Indrani*, 53 All. 422-1981 A.L.J. 86-A.I.R. 1981 All. 212-180 I.C. 498. Therefore, where there is no question of administration, the testamentary or probate Judge has no jurisdiction to accord

No permission where administration has terminated, and there are no debts or legacies to be paid, there is no necessity for the Court to grant permission, 3 C.W.N. 635, *supra*; *Lakhmi v. Nanda Ram* 9 C.L.J. 116 Cf. *Adwait v. Krishnadhone*, 21 C.W.N. 1129. Therefore, where administration is at an end, application to the District Judge in his testamentary jurisdiction for permission to sell is entirely a wrong procedure and really speaking the Judge will have no jurisdiction to pass orders for sale, *Indrani, In re*, 53 All. 422-1981 A.L.J. 86-A.I.R. 1981 All. 212-180 I.C. 498; conversion of property at the instance of a legatee-trustee, is a question under sec. 92 of the C.P. Code and not hereunder, *Ibid*.

So, where after full administration, the administrator remains in possession as an heir-at-law it will not be necessary for him to seek any such permission for his dealings with the estate, 3 C.W.N. 635; *Ramnathan v. Ragammal*, 17 M.L.T. 61 : 27 I.C. 849. In a subsequent case, the Calcutta Court without considering the cases of 3 C.W.N. 635 and 53 All. 422 and without considering the correctness of the decision in 9 C.L.J. 116, has held that even after the estate has been completely administered, the probate Court has jurisdiction to grant permission to sell; an order in that behalf even if improper is not without jurisdiction and

is capable of protecting the purchaser in absence of proof of fraud, *Khetra Mohan Mitra v. Nahnu Bala*, 86 C.W.N. 744 = 66 C.L.J. 635 = A.I.R. 1882 Cal 628 = 14 I.C. 214. This case could have been passed over without any comment, if the point involved had been *res integra*. But that being not so, it is difficult to lend support to this method of disturbing *stare decisis* without reference to a Full Bench. If an administrator, who is also an heir, conveys the estate, without reciting the capacity in which he conveys, he must be taken to have sold the greatest he could.

A. L. Firm v. Maung Thwe, A.I.R. 1923 Rang 69 = 74 I.C. 54. Before granting Necessity for permission permission, the Court should be satisfied as to its necessity,

3 C.W.N. 686, also *Chun Lal v. Mokshada Debi*, 23 C.W.N. 652 = 53 I.C. 309. The mere fact that an estate can be wound up conveniently by distributing the sale proceeds among the heirs is no just ground for granting permission, *Aboob v. Moolla* 11 Bur L.T. 155 = 49 I.C. 302. Where there is a bona fide dispute over a property between the administrator and a stranger who has possession thereof, permission should not be granted to sell such a property, if other properties not subject to contention are available for sale, *Eagi Pu v. Tin Tin* 2 Rang 117 = A.I.R. 1924 Rang 287. Where an application for permission is not treated as one under this section and therefore not confined to this section alone the Court would do well to traverse out of this section and see if it has jurisdiction to grant the permission sought for under any other provision of law, *Madho Ram v. Jarchand Rao*, A.I.R. 1935 All. 960 = 155 I.C. 593. Even where this section only is quoted in the application the Court would grant relief if possible, even outside this section provided warrant can be had for the purpose

from some law somewhere. The terms of the permission Permission to be strictly complied with should be liberally carried out, so that a permission for sale will not authorise a mortgage and *vice versa*, *Ramdhone v. Sharfuldin*, 9 Bur L.T. 236 = 34 I.C. 128 (*supra*). The permission should recite all the necessary particulars of the transaction, such as amount, rate of interest, mode of payment and so forth, *Sarkaga v. Jadunath*, 21 C.L.J. 88 = 19 C.W.N. 240 = 41 I.C. 716. Thus where rate of interest was not fixed by the order of permission and the administrator stipulated to pay interest at the rate of 80 p.c. with half-yearly rents, the Court subsequently reduced it to 9 p.c. simple interest, *Ibid.*

What has been said above simply means that a mere bald permission would not do. Permission should be of such a nature as would extend to all the material terms of the transaction and imply a proper judicial consideration of the fairness and reasonableness of all of them having regard to the circumstances of the case, *Mt. Jas. Ben v. Rewaram* A.I.R. 1927 Nag. 57 = 98 I.C. 6. Where reliance is placed on a permission of the Administration Court for the validity of a

transaction such permission should be strictly proved with Permission to be strictly proved all necessary details as to its terms and validity. It must be shown that all the requirements of law have been complied with in this connection. If the permission is impugned as having been procured by fraud and misrepresentation, enquiries should be held into such

allegations, *Mt. Jai Bai v. Rewaram*, A.I.R. 1927 Nag. 57 = 98 I.C. 6. A permission which has authorised a particular type of transaction cannot be relied on for supporting a transaction altogether of a different character, *Chettiyas Ettam v. Tan Ma Pu*, 6 Rang. 411 = 112 I.C. 261.

The prohibition of the section applies even if the administratrix happens to be the testator's widow, *Ajit K. Saha v. Nagendranalini*, A.I.R. 1960 Cal 484.

Effect of Permission:—The permission is indicative of proper administration and authorises the transfer. A transfer with permission confers a good title on the transferee, and has priority over the residuary legatee's dealings with it; because such legatee only gets what remains after all dispositions made in due course of administration, *Manmatha v. Pawan Chand*, 29 C.W.N. 619 = A.I.R. 1925 Cal. 705,—following *Chatterput v. Moharaj Bahadur*, 32 Cal. 198 (P.C.), *De Silva v. De Silva*, 47 Bom. 103, *Premath Karar v. Cuomur Goswami*, 19 Cal. 26. But the permission will not have this legal effect when obtained by fraud and misrepresentation on an *ex parte* application, and then the transfer will be inoperative, *Mohesh Chandra v. Ganpat*, 29 C.W.N. 401 = 51 I.C. 864, *Mt. Jai Bai v. Rewaram*, A.I.R. 1927 Nag. 57 = 98 I.C. 6. Vide also under the heading, "Sales under void grants," below. A person advancing loans relying on the terms of the Court's sanction is protected; he is not bound to enquire into the truth of the allegations on which the sanction was obtained, *Annada v. Atul Chandra*, 23 C.W.N. 1045. Also vide under the heading, "Position of purchaser or mortgagee at p. 614, ante." The validity of a permission is not open to attack in a collateral proceeding, *vide infra*. As to whether the invalidity can be pleaded in defence, see *Chandri v. Abdul*, and *Mt. Jai Bai v. Rewaram* cited under the next heading.

Validity of Permission cannot be collaterally attacked:—The validity of an order of the Probate Court granting leave to an administrator to sell property cannot be challenged collaterally (e.g. in Land Acquisition proceedings) *Cumalal v. Makshada Debi*, 23 C.W.N. 652 = 52 I.C. 809—referring to *Bhansil Chandra v. Nandram*, 46 Cal. 72 = 22 C.W.N. 620. But it would seem that the plea of the invalidity of the transaction for want of sanction of the Administration Court can be taken by way of defence in order to get rid of its effect, [*Chandri v. Abdul*, 51 Bom. 16 = 28 Bom. L.R. 1860 = A.I.R. 1927 Bom. 49 = 98 I.C. 916] and a separate suit may not be necessary to warrant such a defence, *Mt. Jai Bai v. Rewaram*, A.I.R. 1927 Nag. 57 = 98 I.C. 6.

Hindu widow as executrix or administratrix:—When the Hindu widow acts as an administratrix appointed by the Court, she has to conform to this section so that she cannot sell merely alleging legal necessity, *Kamikshya v. Haricharan*, 26 Cal. 607. On the other hand if she takes permission from the Court under this section, want of legal necessity will not jeopardise the purchaser, *Ibid.* Her

peculiar status under the Hindu Law makes no difference when she acts *qua* administratrix, *Chunilal v. Makshada Debi*, 28 C.W.N. 652, *supra*; see also *Manki Kuer v. Hansraj Singh*, 19 Pat L.T. 284—A.I.R. 1938 Pat. 301—173 I.C. 968. The Hindu widow does not suffer from the disabilities of her status when she acts as an executrix under this Act, and then she has full power of disposition in absence of any restriction in the will, *Mithibat v. Meherba*, 25 Bom L.R. 868, 64 I.C. 897. But if she acts with the Court's sanction obtained by pretending to be an administratrix the so-called sanction will not clothe the transaction with any legal effect, *Kaldase v. Nobo Kumar*, 20 C.W.N. 929 : 28 C.L.J. 606 : 36 I.C. 655.

Legatees acting as administrators—powers of alienation of :—Legatees may be limited owners or holders of absolute estates, and may possess powers of alienation accordingly but if they happen to accept the office of administrator, their powers in that respect will be circumscribed by the provisions of this section when acting *qua* administrators, read the notes under the last heading, also *Manki Kuer v. Hansraj Singh*, 19 Pat L.T. 284—A.I.R. 1938 Pat. 301—173 I.C. 968.

Which Court to give permission :—This section contemplates only the permission of the Probate Court which grants the probate or the letters of administration. But if for the time being an administration suit be pending in a Civil Court in respect of the estate, the administrator appointed by the Probate Court can take permission to sell from that Civil Court, *Ma Chit Su v. National Bank of India, Ltd.*, L.R. 6 P.C. 186 : 1926 M.W.N. 847 : A.J.B. 1926 P.C. 261 (268).

When to ask for Permission :—From what has been said above, it is evident that leave should be applied for only after a grant has been made, *Re Ram L. Ganguly*, 1 C.W.N. 69

Permission to be in writing :—Under clause (i), the order granting permission for removal of restrictions on the executor must be in writing. Clause (ii) is silent on the point but writing seems to be necessary for this case as well. As the order granting permission is appealable (*vide infra*), the order must be in writing for the purpose of scrutiny by the appellate Court.

Sub cl. (a) : Mortgage etc :—An administrator has no authority in law to mortgage the estate under his administration even for what is called legal necessity. In order to validate a mortgage by an administrator it must be proved that the mortgage was executed in due course of administration, it must also be shown that he was entitled to mortgage the general estate as distinct from the business for which legal necessity is alleged, *Kulendras Dechand v. Jevkish Naoroji*, 48 Bom. L.R. 98—A.I.R. 1942 Bom. 54—198 I.C. 609. A mortgage executed by the executor in disregard of the limitations on his powers is not

binding on the ultimate owner of the estate, *Maneklal v. Keshav*, 89 Bom. L.R. 1094.

Sub. cl. (b) : Lease :—A lease of immoveable property by an administrator will require the sanction of the Court under this sub-section, only if it is for more than five years. *Subhadra v. Chandra Kumar*, 8 C.W.N. 54; *Sita Sundari v. Barada*, 28 C.W.N. 444; A.I.R. 1924 Cal. 636 Cf. *Satis v. Jnanada*, 1 Cal. 868 (Cal.); *Sarbesh v. Harsaoyal*, 14 C.W.N. 451.

Clauses (iii) : Voidable :—A disposal of property in contravention of Clause (i) or clause (ii) is not altogether void, but is only voidable at the instance of any other person interested in the estate, *Eastern Mortgage Agency Co. v. Rebati Kumar*, 9 C.L.J. 260; *Ghulab Chand v. Bahuria*, 19 C.L.J. 482: 10 I.C. 268; *Midnapore Zemindary & Co v. Ram Kanar*, 6 Pat 80—7 Pat L.T. 188—1925 P.H.C.C. 254: A.I.R. 1926 Pat. 180—91 I.C. 169; *Janendra v. Shiroshi Charan*, 49 Cal. 626: A.I.R. 1923 Cal. 25. This means that if the person prejudicially affected by such disposal seeks relief, the Court will assist him on equitable terms, 18 C.W.N. 444 (*infra*). A sale without the requisite permission will be voidable although the administrator happens to be the heir-at-law of the deceased, *Ma Ne v. On Hunt*, 7 L.B.R. 93: 221 C. 925. The fact that the purchase was for value and made in good faith makes no difference, *Ibid*. Cf. *A L Firm v. Mg Thowe*, 1 Bur. L.J. 183. A.I.R. 1928 Bom. 69: 74 I.C. 54. The holder of a money decree against the estate in the hands of the administrator is, no doubt, entitled to set aside a *cordalle* mortgage executed by the administrator *without the leave of the Court*, but he can do so only by making restitution to the mortgagees of the money that was actually advanced by the mortgagees to the estate, *Zollikofer v. Chettiar Firm*, 9 Rang. 34—A.I.R. 1931 Rang. 277—131 I.C. 780. When an unauthorised sale is set aside, a *bona fide* purchaser will be entitled to be reimbursed for all expenses incurred by him for the improvement of the property. There will no reimbursement for the capricious and wanton improvements. In calculating compensation for the improvement, the rents and profits received by the purchaser in the interim period will be taken into account, *Maneklal v. Keshav*, 89 Bom. L.R. 1094—A.I.R. 1938 Bom. 71—1781.C 780. The transaction in contravention of this section, though voidable at the instance of some interested person is perfectly good as between the parties to it, 3 C.L.J. 260, *infra*; 8 C.W.N. 54 *supra*. The Bombay Court has held that where a transaction by an administratrix becomes voidable by reason of want of the Court's sanction, even the administratrix would not be precluded from raising the plea of want of sanction by way of defence, *Chandri v. Abdul*, 51 Bom. 16—28 Bom. L.R. 1960—A.I.R. 1927 Bom. 49—98 I.C. 915. A transaction which is simply voidable, always stands good until avoided, *vide* notes under sec. 810, *infra*.

Any other person interested :—For interested persons, *vide* notes under sec. 283 at p. 546, *ante*. Also under the heading, "Locus Standi" at pp. 490-50.

Such persons are heirs and beneficiaries and not any other person; therefore no objection can proceed from the landlord, 1925 P.H.C.O. 26 : 91 I.C. 169 (*supra*). The expression means *any person* claiming independently of the executor whose alienation he seeks to avoid, *Jagohandhu v. Dwarika*, 28 Cal., 446. So a creditor of the executor in his personal capacity, who is not a creditor of the deceased's estate cannot avoid the alienation, *Ibid.* The person entitled to avoid an alienation under this section can do so only on equitable terms of re-imbursement, *Sita Sundari v. Barada*, 28 C.W.N. 444 : A.I.R. 1924 Cal., 686; that is, before avoiding the transaction he must disgorge all benefits derived by him under it, *Churn Chandra v. Kailash*, 13 C.L.J. 447 ; 10 I.C. 269 ; *Ghulab Chand v. Bahuria*, 18 C.L.J. 432 ; 10 I.C. 268. As to the pecuniary legatee's right to set aside a mortgage by the executor (who is also a residuary legatee) *vide* the P. C. case of *Bank of Bombay v. Suleman*, 33 Bom., 1 : 12 C.W.N. 998 (P.C.).

Limitation for setting aside a voidable Sale:—The limitation for a suit to set aside a sale hereunder on the ground of having been effected without the permission of the Administration Court, is Art. 91 (now Art. 59) of the Limitation Act, *Ma Kin v. Ma Bwin*, 5 Rang. 266 — A.I.R. 1927 Rang. 186 — 108 I.C. 264.

Appeal:—An order granting permission to sell is appealable, *Haj Pu v. Tin Tin* 2 Rang. 117 : A.I.R. 1924 Rang. 237 : 80 I.C. 746 ; *Uma Charan v. Muktakeshi*, 28 Cal. 149 : 5 C.W.N. 443 Cf. *Kalimuddin v. Mahurni*, 99 Cal., 563 : 16 C.W.N. 662 ; *Sarat Chandra v. Benode Kumari*, 20 C.W.N. 28 : 33 I.C. 143.

Administrator de bonis non:--His powers are like that of an ordinary administrator, (see 313) and this section applies to him; so it is not necessary for him to ask for leave to dispose of property in his application for a grant, *vide* at p. 477, *ante*.

Administrator-General.—This section does not apply to him, *Prem Lal v. Administrator-General*, 22 Cal., 788 & 1011 ; *Saraswati v. Administrator-General*, 23 Cal., 580.

Power of Compromise:—The executor or administrator has very wide powers to make compromises binding on the estate, *Re Houghton*, (1904) 1 Ch. 622 ; *Re Warren Weedon*, 32 W.R. (Eng.) 916. But his conduct must be characterised by good faith, and he must not contravene the provisions of this section. Therefore, a compromise by an administrator agreeing to grant a *darpatti* lease without the sanction of the Court will be voidable hereunder, *Sarlesh v. Haridyal*, 14 C.W.N. 451 : 11 C.L.J. 346. Executors acting bona fide can settle claims relating to the estate, *Herbert Archibald v. Delhi & London Bank*, 86 All., 217 : 12 A.L.J. 274 ; 28 I.C. 143. Cf. notes at p. 509, *ante*. In the absence of any restriction, the executor is perfectly competent to compromise the suit disputing the will

by agreeing to the creation of a maintenance charge in favour of the contesting widow, *Sabitri Thakurani v. F. A. Savi*, 12 Pat. 369 = A.I.R. 1988 Pat. 866 = 145 I.C. 1.

Power of making reference to Arbitration:—As to whether one executor can enter into an agreement to refer to arbitration without consulting his co-executors, see A.I.R. 1966 Nag. 126.

Sales under void Grants:—*Vide* notes at p. 577, *ante*. In some of the cases there it has been said that if the grant is void *ab initio*, all transactions thereunder are equally void. Cf. *Dekendra v. Administrator-General*, 33 Oal. 718 : 10 C.W.N. 673 : 3 C.L.J. 422 (on appeal 35 Cal. 966); *Pundit Frayrag Raj v. Goukaran*, 6 C.W.N. 787; *Gopal Das v. Budree Das*, 10 C.W.N. 662; *Fanindra v. Jagadishari*, 14 Oal. 816. Some of the old English cases were also to the same effect. But it has been recently held in England that if the transaction was in due course of administration, it would be perfectly valid. Because if it were otherwise, no person could safely deal with, or accept a title from, an executor or administrator on the spot and acting for the time being, because no body knows whether the grant to him would be afterwards declared void. *Hewson v. Shelley*, (1914) 2 Ch. 18 : 1914 W.N. 127. It is expected that this case will turn the current of judicial opinion in this country as well.

Sale under a grant subsequently revoked:—A purchaser of property sold under a grant in order to discharge a debt which the true executor or administrator was compellable to pay acquires an indefeasible title, *Sutloja v. Jedenath*, 19 C.W.N. 240 and the cases elaborately discussed in the report of this case. *Vide* also the case of *Hewson v. Shelley*, (1914) 2 Ch. 18, cited under the last paragraph. Also the notes at pp 488-89, *ante*. See also *Rādhā Lakshmi v. Joyes Chunder*, 60 I.C. 479 (Cal.), in which a bona fide mortgage by the executor executed to by the legatees was held to be binding on the estate.

Presumption in favour of Executor:—There is always a presumption of proper administration in favour of the executor or the administrator until the contrary is proved. *Re Ven & Frize's Contract*, (1894) 2 Ch. 101 (114).

Onus:—There is no onus on a purchaser from the grantee to prove the truth of the allegations on which sanction of the Court is obtained, *Annada v. Atul Chandra*, 23 C.W.N. 1045.

Maintenance of widow:—The maintenance of a widow who is the executrix, though a charge on the estate is not a debt or legacy. So where all debts and legacies are paid, and no outstanding debts remain due and the estate fully administered, no application will lie under this section on the score of such

maintenance. *Lakshmi Narain v. Nanda Ranj*, 9 O.L.J. 116 : 3 I.C. 287 (see at p. 608, *ante*).

Toleration of Burma Court in allowing interference with proceedings before it:—Though not commendable by itself, still there was nothing illegal in the rule of practice of the Burma Court which recognised the power of another Court to grant permission for the sale of property belonging to an estate in respect of which a suit for administration was pending before the Burma Court, *Ma Chit Su v. National Bank of India*, 30 C.W.N. 789 - 50 M.L.J. 644 = A.I.R. 1925 P.C. 261 - 91 I.C. 432, P.C.

Sub-sec (3):—This sub-section provides for endorsing on or annexing to the grant copies of the specified sections and clauses in the case of persons, subject to sub-sec. (2).

Sub-sec (4):—It lays down that non-compliance with the provisions of sub-sec. (3) will not invalidate the grant, nor will it exonerate the executor or administrator from liability to follow the provisions of this section.

308. [Pro. S. 90A & Suc. S. 269A] An executor or administrator may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

- (a) on such acts as may be necessary for the proper care or management of any property belonging to any estate administered by him, and
- (b) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

General Notes.—This section was introduced in the repealed Acts of 1681 and 1865 by Act XVII of 1919. It is difficult to follow the real object of the section. It is enacted to give the executor or administrator greater powers of administration, and to give him greater facility of work. As to liability of each of several executors for expenditure incurred by him, see *Satya Kumar v. Satya Kripal*, 10 O.L.J. 503 : 3 I.C. 247 Cf *Chinna v. Venkatasubba*, 33 M.L.J 196 : 6 L.W. 85 : 41 I.C. 605. Expenses of Sapinda Sradha are not expenditure of management within the meaning of cl. (a), nor are they sanctionable expenses (by the High Court) within the meaning of cl. (b) of the section, *Kul Kumar v. Rash Vehuri*, I L.R. (1947) 2 Cal. 195. Where an executor borrows money, position of took a loan for the benefit of the estate by executing a Lender. pronote in favour of the creditor and the creditor sued on

the promissory note by impleading all necessary parties for a decree binding on the estate, the Court held that the only right which the creditor could claim was the right to be subrogated to the right of the executor to be indemnified out of the estate to the extent it was benefited. The order for subrogation and a decree on that basis could be made only when the right of indemnity of the executor under this section was first established, *Manindra Ch. Nandi v. Sudhir Krishna Binerji*, 63 C.L.J. 589 = 35 C.W.N. 850 = A.I.R. 1932 Cal. 182 = 136 I.C. 893. From what has been said above it is apparent that a creditor lending money on a promissory note to the executor for his testamentary expenses has no right of direct recourse against the estate, he can only utilise the executor's indemnity against the estate for his own benefit, *Joseph Sar-prasadan v. Subramania Chettian*, (1937) 1 M.L.J. 447 = 1937 M.W.N. 188 = 45 L.W. 370 = A.I.R. 1937 Mad. 484 = 170 I.C. 167. Read the notes under sec. 321, *post*. Where an executor has been authorised by the will to carry on the business of the testator on a reduced scale for the purpose of realisation of the outstanding with a view to eventual winding up of the business, and he borrows money for that particular object, the creditor will have the right of direct recourse to the estate of the deceased, *Thirunarukkasasu v. Purushotham*, 1935 M.W.N. 1136 = A.I.R. 1935 Mad. 890 = 169 I.C. 266. According to the Rangoon

Debt contracted by Court, if an executor contracts any debt after the death of the testator, he does so on his own responsibility. If there is no remedy.

If the executor borrows any money for the purposes of the business left by the testator, even then the creditor's remedy is against the executor personally, enforceable only by means of a personal action and not by an administration suit. If the debt is incurred the executor will have a right of indemnity against the estate and this right of indemnity in favour of the executor will be available to the creditor by subrogation or as an attachable asset of the executor, *Mahanth Singh v. U. Aye*, 14 Rang. 336 = A.I.R. 1936 Rang. 614 = 166 I.C. 247.

An executor unless authorised by the will cannot do banking business and accept deposits from creditors so as to bind the estate in his hands, even where the estate is benefited by the deposit. *Hrishakesh Das v. Khantmani* A.I.R. 1950

Cal. 257 As to whether the word management will mean trade or to continue the carrying of the testator's trade *vide, Jethalhai v. Chetlal*, testator's business

94 Bom. 209. 12 Bom. L.R. 1: 5 I.C. 594 The executor can raise funds to carry on the business *Sudhir Chandra v. Kamal Chandra*, 45 Cal. 538 = 21 C.W.N. 1048 = 41 I.C. 503, but see *Re Chancellor*, L.R. 26 Ch. D. 42. He can however complete the contracts entered into by the testator, *Collinson v. Lester*, 20 Bea. 355. Cf *Labouchere v. Tupper*, 11 Moo P.C. 198; *Re Johnson*, L.R. 15 Ch. D. 548; *Re Cameron*, L.R. 26 Ch. D. 19. The Bombay Court is of opinion that an executor, unless expressly authorised by the will, or an administrator, is not entitled to continue the business

of the deceased at all except for the purposes of winding it up. If he does continue it for any other purpose than winding up, it is deemed to be continued at his own risk, *Kuberdas Dev Chand v. Jankish Naoroji*, 43 Bom. L.R. 981-A.I.R. 1942 Bom 64-198 I.C. 609. It is obviously improper for an executor to utilise the general assets of the estate for the purpose of carrying on a business of the testator. If the will expressly authorises the executor to pledge the credit of the business for the purpose of carrying it on, the power of the executor will extend only to the letter of the authority and not further so as to charge the general assets of the estate, *Dinshaw Dadabhai v. Mohamad Mohamood* I.L.R. (1940) Mad. 211-(1940) 1 M.L.J. 655-1989 M.W.N. 1150-A.I.R. 1939 Mad 9 2-189 I.C. 506.

Where a will creating a trust conferred power on the trustees to co-opt others in cases of vacancy, that would not deprive the surviving trustee of his power to act alone, *Som Giri v. Ramratan Giri*, I.L.R. (1941) All. 711-1941 A.L.J. 660-A.I.R. 1941 All. 387-197 I.C. 696. The mode of administration and the extent of liability for administration will be governed by *lex foris*, (1958) 2 All. E.R. 1452.

Where the testator put all his liquid funds together and mixed up the accounts of his properties with those of his business as a printer, publisher and book-seller and authorised his executor to carry on his business, the direction in the will, will empower the executor to mortgage the properties for the purpose of his printing, publishing and book-selling business, *Suneel Kumar v. Shishir Kumar*, 62 Cal. 652.

309. [Pro. S. 90B & Suc. S. 269B] An executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator-General by or under the Administrator-General's Act, 1913.

N.B.:—This section was introduced in the repealed Acts of 1881 and 1865 by Act XVIII of 1919, following sec. 4 (3) of Act V of 1902 (Administrators-General and Official Trustees Act), and has ultimately found a place here.

Remuneration of Executor or Administrator:—Ordinarily, an executor or administrator is not entitled to any allowance at law or equity for his troubles and loss of time. *Vide Williams On Executors*, 11th Ed. pp 1479-84. Where the executor has already been remunerated for his pains by an express legacy, the Court will never allow him any further remuneration, *Akshay K. Ghose, In re*, A.I.R. 1949 Cal. 462 His right to get commission or agency charges was first

recognised by the Act of V of 1902 (*supra*) and ultimately found recognition here. The rates of commission etc. shall not be higher than that for the time being fixed for the Administrator-General under Act III of 1918. Of sec. 42 of that Act. These rates differ in different Provinces, (see the Law of Administrator-Generals and Official Trustees by Alex. Kinney). As to Bank's charges for service, when the Bank is appointed executor and trustee, read *Re Campbell*. (1954), 1 All E.R. 448.

310. [Pro. S. 91 & Suc. S. 270] If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by Executor or Administrator:—An executor or administrator cannot, as a general rule, purchase either *directly* or *indirectly*, any portion of the estate, and if he does so, he is considered as a trustee for, and accountable to, the beneficiary. *Hall v. Hallett*, 1 Cox. 134; this disability is due to his fiduciary character. All persons holding a position of trust are presumed to act for the benefit of the *cestui que trust*, and are ordinarily precluded from buying the trust property. *Re Boyles d B L Co.*, (1902) 1 Ch. 244 (246); *Nugent v. Nugent*, 1908, 1 Ch. 546. Cf. *Watson v. Toone*, 6 Maddock 169; *Cook v. Collingridge*, Jacob. 607; *Thomson v. Eastwood* (1877) 2 A.C. 216 (236). A trustee, if not a trustee for sale, can, however acquire an estate from the beneficiary who is *sui iuris*, but only if he has made the fullest disclosure to him of all facts within his knowledge as to the value and condition of the estate, and the parties are at arm's length. *Raja Peary Mohun v. Monahar Mukherji*, 48 I.A. 258 84 O.L.J. 66 · 26 C.W.N. 138 · 41 M.L.J. 68 · 28 Irom L.R. 918 · 19 A.L.J. 773 · 14 L.W. 104 · (1921) M.W.N. 554 · 62 I.C. 76. P.O. The above principle applies to a purchase by the executor or administrator, *Vaughan v. Heseltine*, 1 All 753, *Daugan v. Macpherson*, (1902) A.C. 197. Such a purchase is regarded as a breach of trust without enquiry whether it was beneficial or not. So, if it is challenged, the onus will be upon the executor to prove that he gave full value and all information was laid before the *cestui que trust*. *Baroda Prosad v. Gajendra*, 9 O.L.J. 383 · 13 C.W.N. 557 · 1 I.C. 289; otherwise the sale would be *voidable* at the instance of a person interested in the estate. (N. B.:—In *Baroda Prosad's* case, *supra*, the purchase at an execution sale of a legatee's interest by the administratrix *durante minoritate* was upheld as not made in contravention of this section). The disability does not attach to an executor who has renounced office, *Makintosh v. Barbar*, 1 Bing. 60 · 7 Moo. 315; *Clark v. Clark*, 9 A.C. 733.

Voidable:—Vide notes at p. 612, ante. Cf. *Boston D. S. Co. v. Ansell*, (1888) 39 Ch. D. 839 (365).

311. [Pro. S. 92 & Suc. S. 271] When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

Illustrations.

(i) One of several executors has power to release a debt due to the deceased.

(ii) One has power to surrender a lease.

(iii) One has power to sell the property of the deceased whether moveable or immoveable.

(iv) One has power to assent to a legacy.

(v) One has power to endorse a promissory note payable to the deceased.

(vi) The will appoints A, B, C and D, to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

"Several Executors":—Where there are several executors, they are regarded in the eye of law as a single person, with the consequence that the acts of any one of them are considered to be the acts of all, and in case of death of any one of them, the interest passes to the survivor or survivors without any further grant, *vide*, Williams *On Executors*, 11th Ed. p. 708; also *Jacomb v. Harwood*, 2 Ves. Sen. 267 (1688), citing *Welland v. Fenn*. Powers of all may be exercised by any one, only when such one has proved the will, *Shek Moosa v. Shek Essa*, 8 Bom. 241; *Satya Prasad v. Motilal*, 27 Cal., 683. One of several executors can maintain a suit on a promissory note executed in favour of a deceased testator, when the decree prayed for is one in favour of all the executors, *Sree Rama v. Takurdas*, A.I.R. 1960 Andhra Pra. 165. One executor can give a valid discharge, *Illiue. (i)*; 28 All. 252, *infra*; 2 Ves. Sen. 267 (*supra*); *Charlton v. Durham*, 4 Ch 333; *Lee v. Sankey*, L.R. 15 Eq. 204; where the executors invest money on a mortgage, endorsement of part payment on the mortgage bond by one of them does not amount to a discharge, *Chandra Mohan v. Satya Kripal*, 29 I.C. 139. A notice of resumption of land is sufficient and valid when given to one of several executors who were joint occupants thereof, *Secretary of State v. Narayan*, 80 Bom., 157. For the liability of the estate for debts contracted by one of several executors, see *Debendranath v. Hem Chandra*, 81 Cal. 268. The executor is personally liable for a debt incurred after the death of the testator, and the decree against him for such debt does not bind the estate, *Debendranath*

v Radhics Charan. 8 C W N. 185. As to the right of several executors, *inter se*, see *Jehangir v. Bai Kukibat*, 27 Bom., 211. An executor, to whom leave has been reserved can call for an inventory and account from his co-executors who have proved the will and are managing, *Ibid*. One executor can restrain his co-executor by injunction if the latter intermeddles with the estate without obtaining probate, *Re Moore*, 18 P.D. 86, following *Re Parker*, 54 L.J. Ch. 694. One of several executors may settle an account with a person liable to the estate, and such a settlement binds the estate, though the other executors dissent, *Smith v. Everett*, 27 Beav. 446. This principle will not however apply where the executor making the settlement is himself one of the persons liable to the estate, *Scot. v. Lord*, 8 Jur. N.S. 249; *De-Cordova v. De-Cordova*, 4 App. Cas. 692. One executor can bind the estate by his admission or acknowledgment, *Simpson v. Gutteridge*, 1 Mad. 616; *Chandra Kanta v. Ram Narain*, 8 W.R. 63; *Ex parte Ryby*, 19 Ves., 461. A decree against one administrator (as representing the estate) binds the others as well, though the latter can call upon the former to account for administration, *Grace Rhodes v. Padmanabha*, 1 L.W. 1033 : 26 I.C. 369. One executor can save limitation by acknowledgment, *Re Macdonald*, (1897) 2 Ch. 181. Vide also *A'muri v. Venkata Baghava*, 42 M.L.J. 559 ; (1922) M.W.N. 278; 10 L.W. 52; 67 I.C. 104. The word "several" in the section does not mean "possessing powers to act severally," *Ibid*.

Compromise between Co-executors:—An executor cannot compromise the claim of his co-executor against the estate. Where on a petition for the grant of probate to an additional executor, the Court accepted a compromise between him and the other executor by which the latter agreed to renounce his executorship on the former executing in his favour a mortgage for his alleged dues, held, (1) the compromise could not be accepted, (2) the acceptance or sanction of the compromise by the Court did not confer on it greater validity than it otherwise possessed, *Chidambara & Krishna Swami*, 39 Mad. 365. 28 M.L.J. 285 : 2 L.W. 241 : 28 I.C. 221.

Effect of the Section:—The effect of this section is this that where several executors obtain probate and the will directs them all to act together, none of them can act singly; but if one of several executors has obtained probate alone by reason of the others having renounced or refused to accept office, the grantee of probate can act singly, *Satya Prosad v. Motilal*, 27 Cal. 683. The section renders the taking out of probate a condition precedent to prosecution of a suit by one of several executors, *Sheik Moosa v. Sheik Essa*, 8 Bom., 241. Cf sec. 305. Cf *Crawford v. Forshaw*, L.R. 2 Ch. 261; *Dowse v. Cox*, 8 Bing. 90.

Power of appointment conferred on three executors can be exercised by two of them, *Anantha Baghuram v. Bapanna Rao* A.I.R. 1959 Andhra Pra. 449—explaining I.L.R. 87 Mad. 199 (P.G.).

Mahomedan Executor:—A Mahomedan executor may not take out probate, 57 Oal. 889 : 15 C.W.N. 185 and other cases cited at p. 381, ante. This privilege will not however entitle him to contravene this section; therefore except several Mahomedan executors cannot maintain a suit, which, if the others insist, should be dismissed, 8 Bom. 241 (*supra*). Cf. *Hafezabas v. Abdul Karim*, 19 Bom., 89.

What acts can be done singly:—Under illus. (i) one of several executors can give a discharge for debt due to the deceased. But when such debt has merged into a decree in favour of all the executors it ceases to be a debt due to the deceased and one executor cannot give discharge for the entire amount of the joint decree. *Lachman Das v. Chaturbhug*, 28 All. 252. Cf. *Tamman Singh v. Luckman Kunwar*, 26 All. 318; *Motiram v. Hanmu*, 26 All. 384; *Chandra Mohan v. Satya Kripal*, 29 I.C. 139. Vide O. xxi, r. 15, C.P. Code, 1908. One executor cannot, contrary to the wishes of his co-executors, pay a barred debt, *Midgeley v. Midgley*, (1898) 3 Oh. 282. One co-executor, cannot without the Court's authority sell or transfer real estate, *Ex Pawl y.* (1900) 1 Ch. 60.

Direction to the contrary—The rule of this section operates only in the absence of any direction to the contrary. Therefore it has no application where the will over-rides it, *Era Doddha v. Rama Reddi*, 20 I.C. 505. (Mad.). Thus, where the will provides that the opinion of the majority only will prevail, such direction excludes the operation of this section. *Ibid.* Vids also illustration (vi). Where the will has directed that the trustees were to act by majority, and the majority had passed a resolution recommending an amicable settlement of certain disputes and opposing institution of litigations over those disputes, the minority will have no right, against the wish of the majority, to plunge the estate in litigation with a risk of incurring liability for the costs of that litigation, *Gordhandas Madan Lal v. Bhigawandas Rampershad*, A.I.R. 1933 Sind, 232—150 I.C. 476. In the case of administrators such direction can proceed from the Court as well. It should however be remembered that the Court always prefers sole to joint administration, see 1 Phill. 126, cited at pp. 409 & 414, ante. It seems that the direction can proceed from the Court where several persons prove the will. In the absence of a direction to the contrary in the will, two out of three executors were held competent to renew a barred debt in *Alamur v. Venkata*, 42 M.L.J. 559 : A.I.R. 1922 Mad. 214. Vids under the heading, "Effect of the Section," *supra*. Note that whereas under sec. 312 "the direction to the contrary" has been expressly mentioned as being in the will or the grant, there is no such express mention here.

Suit by Executors—Parties:—In a suit concerning the estate between the beneficiaries and a stranger, the executor or administrator can represent the beneficiaries. See O. xxi, r. 1; *Siddharaju v. Gopicharom*, 17 C.L.J. 233 : 18 I.C.

963; *Cowasji v. Bella*, 11 Bur. L.T. 249 : 50 I.C. 509; *Sakti & Ram Kishan*, 55 I.C. 504 (Pat.); where there are several executors, ordinarily, they should all be made parties, though under O. xxii, r. 2 non-proving or absent executors may be left out, *Kumar Saradindu v. Dharendra Kant*, 2 C.L.J. 484; Of 77 I.C. 942; 27 Cal., 683, *supra*. Where probate was granted to two executors and one of them sued for rent, making the other executor pro-forma defendant, there was no defect in the frame of the suit, *Soudamini v. Teniram*, 54 I.C. 755; likewise, a suit for rent by one of several administrators who are impleaded as pro-forma defendants is maintainable, *Nazir Ahmad v. Ragbat Ali*, 58 I.C. 478 (Cal.), Of. *Hafizbas v. Abdul Karim*, 19 Bom., 68.

312. [Pro. S. 93 & Suc. S. 272] Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivor or survivor.

N.B. :—"The words 'in the absence.....administration' which occur in sec. 93 of the Act of 1881 have been adopted in the clause as they appear to state the law more accurately"—*Notes on Clauses of the Original Bill*. Note that the *contrary direction* is mentioned as being in the will or in the grant of Letters; the case of Probate is not contemplated here. Compare the notes at p. 621, *ante*.

Survival of powers:—The section is based on *Flanders v. Clarke*, 8 Atk. 509, which lays down that the power of an executor without being determined by the death of his co-executors survives to him, and also upon *Hudson v. Hudson*, Cas. Tem. Talbot., 127 which makes a similar provision for the case of an administrator. *Vide* the rule of Survivorship among executors enunciated in sec. 226, *supra*, notes whereunder may be referred to in this connection. *Vide* also *Williams On Executors*, 11th Ed., p. 165, *et seq*.

Of the Office —The section seems to make a distinction between the powers conferred on an individual personally and the powers that go with the office he holds and it is the powers attaching to executive office that are contemplated herein, *vide Amritalal v. Surnomays*, 24 Cal 589. Cf. *Barada Prasad's case*, cited at p. 429, *ante*.

Derivative Executor:—*Vide* notes at p. 429, *ante*. Also *De Souza v. Secretary of State*, 12 B.L.B. (O.C.) 428; *Ramanathan Chetty v. Ragammal*, 17 M.L.T. 61 : 27 I.C. 849.

313. [Pro. S. 94 & Suc. S. 273] The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

Powers of Administrator de bonis non —*Vide* notes at p 477 *ante*. The administrator *de bonis non* is the sole representative of the deceased with respect to the unadministered portion of the estate, and possesses all the powers of the previous administrator (or executor), *Catherwood v Chabond*, 1 B & C 184 (cited at p 477). If the estate is unadministered, a suit on behalf the estate for rents etc cannot be maintained without taking out administration *de bonis non* under sec. 268, *supra* *vide Narasimmu v Gulam Hussain*, 16 Mad 71 (cited at p. 476, *ante*). No administration *de bonis non* is possible, (1) where the estate has been fully administered (3 O W N 685 and other cases cited at p. 477 *ante*), (2) where there are other executors. (*vide Re Reed* cited at p 476, *ante*) Thus where S, by his Will appointed A and B as his executors as well as shebaits of an idol in whose favour the Will created a trust in respect of the whole of his properties S left a widow and a daughter. The latter obtained administration *de bonis non*, and in this capacity brought a suit against the heirs of A for delivery to her of the debutter estate and for accounts held, (1) the suit was misconceived. As soon as debts, funeral expenses and legacies were paid, there would be no property unadministered which could pass to an administrator *de bonis non*, (2) the administrator *de bonis non* had no powers to maintain an account suit of this description, *Gour Chandra v Monmohini*, 26 O W N 332 62 I C 476

Probate Duty —To be paid for the unlevied portion, see sec 19C of the Court Fees Act

314. [Pro. S. 95 & Suc. S. 274] An administrator during minority has all the powers of an ordinary administrator.

Power of Administrator durante Minoritate —Such administration, in the absence of other limitations lasts so long as the minority continues, and the administrator possesses all the powers of an ordinary administrator. See *Re Cope*, 16 Ch. D 440, also Williams *On Executors* 11th Ed., p 392, *et seq*. *Vide* the notes and cases under sec 244 and 246, *ante*. As to the power of an administrator *durante minoritate* to purchase at auction the property of the minor beneficiary, see *Birida Prosad's case* cited at pp 429 & 458, *supra*: also *vide* under sec 310 at p 618, *ante*.

315. [Pro. S. 96 & Suc. S. 275] When a grant of probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator.

Married Executrix or Administratrix:—We have already seen under secs. 223 and 236, that except in the cases of Hindus etc. a grant cannot be made to a married woman, without the consent of her husband, vide at p. 426, ante. But that does not place her under any disability in respect of her office as an executrix or administratrix. She has all the powers of an ordinary executor or administrator. So long as she acts *qua* executrix, no disabilities will attach to her because of her sex. Cf. *Kanukshya v. Hari Charan*, 26 Cal., 607.

Her Husband not a necessary Party:—Unless the Court otherwise directs, the husband of the executrix or administratrix is not a necessary party to a suit by or against her, see O. xxxi, r. 3. C.P. Code, 1908.

CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

Duties of executor how long last:—The duties of an executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the forms of the will of which he is the executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatees, the executor has no authority to manage the estate on such legatee's behalf, *Sankar Nath v. Biddulata*, 28 C.L.J. 271 : 48 I.C. 295.

316. [Pro. S. 97 & Suc. 276] It is the duty of an executor As to deceased's funeral. to provide funds for the performance of the necessary funeral ceremonies of the deceased in manner suitable to his condition, if he has left property sufficient for the purpose.

N. B.—"The wording of sec 97 of the Act of 1881 has been followed as it is more suitable to the wider scope of the consolidated Bill and involves no change of substance"—Notes on Clauses of the Original Bill

Deceased's Funeral:—The executor is bound to provide funds for the funeral ceremonies of the deceased in a manner suitable to his position in life, subject to this condition that there are sufficient assets for the purpose. As to the test of a 'fitting' funeral, see *Mullick v. Mullick*, 1 Knapp 246. Cf. *Stockpole v. Stockpole*, 4 Dow. 227; *Hancock v. Padmore*, 1 B. & Add. 260. Sufficiency of the funds must be taken into consideration, notwithstanding that the testator has given extravagant directions, because the testator's estimate of his own financial condition

may be inaccurate, mistaken and exaggerated. *Slag v. Punter*, 3 Atk. 119. Simply because the testator gives the executor unlimited discretion in the matter of expenses, that does not authorise the executor to cause deprivations to the beneficiaries. *Nestorius v. Nundulal*, 30 Cal., 369 : 7 C.W.N. 353. For the case of a deceased nobleman dying solvent, see *Bisset v. Anticlus*, 4 Sim 612. Under the repealed Succession Act, the duty of the executor was to perform the funerals; under this section his duty ends if he provides funds for the purpose. As the present Act applies to persons of divergent sects possibly having executors of different sects who may not perform the funerals themselves, this change has been thought necessary though not of substance. *vide* "Notes on Clauses," *supra*, also *Mullick v. Mullick*, *supra*. As to the executor's right over the dead body and his power to dispose of it, see *Williams v. Williams*, 20 Ch. D. 659; *Reg. v. Price*, 12 Q.B.D. 247. *Vide Williams On Executors*, 11th Ed., p 727, 1409-10, 1412, etc.; also *Re Dixm*, (1892) P. 386. The expenses of *Sapindakaran Sradh* of the testator are not his funeral expenses, *Kali Kumar Chatterji v. Rashbehari*, I.L.R. (1947) 2 Cal 196.

317. [Pro. S. 98 & Suc. S. 277] (1) An executor or administrator shall, within six months from the grant of Inventory and account, probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.

Inventory within Six months:—Under this section the grantee is bound (note the word "shall") to exhibit in the Probate Court (making the grant) an

inventory of assets and liabilities of the deceased within six months (or within an enlarged period) from the date of the grant. The section requires one initial inventory and one final account, *Hemandas v. Chellaram*, 9 S.L.R. 184 : 82 I.C. 554 ; Cf. *Chandra Kumar v. Prosunno*, cited at p. 498, ante. The inventory should be complete and not scrappy ; and it is desirable that it should be in one document. No inventory satisfies the statutory requirements which does not contain a "full and true estimate of all the properties in possession &c." *Bhubaneswari v. Collector of Gaya*, 40 I.A. 286 : 41 Cal. 556 : 18 C.W.N. 153 ; 19 C.L.J. 186 : 26 M.L.J. 56 : 15 M.L.T. 87 ; (1914) M.W.N. 18 : 12 A.L.J. 69 : 16 Bom. L.R. 95 : 21 I.C. 976 (P.O.). For penalty for non-compliance with the requisition for inventory or for exhibiting false inventory and for other general informations, vide the notes and cases cited below in relation to the questions of accounts.

Account within one year :—The law obliges the executor or the administrator to render accounts. A provision in the will that no accounts will be required does not exonerate him from such obligation, *Peari Lal v. Bepin*, 46 I.C. 336 (Cal.). The section imposes a duty on the executor to exhibit an account and not a duty on the Court to compel such exhibition, though the Court can in its discretion require the executor to fulfil his obligation, *Mulla Basim v. Mulla Abdul Rahim*, 9 Bur. L.T. 148 ; 8 L.B.R. 422 : 35 J.C. 950. The words "an account" mean one account, *Moresh Chandra v. Biswanath* 26 Cal. 250 : 1 C.W.N. 646. The old section contained the words, "from time to time" which encouraged the contention that a series of accounts are contemplated, vide the discussion in 5 Cal. 250. These words being omitted here, now there is no room for such a contention. The section contemplates one initial inventory and one final account *Hemandas v. Chellaram*, 9 S.L.R. 184 : 82 I.C. 554 ; *Ite Nanjappa Asari*, (1968) 2 M.L.J. 280. So it has been said that the statute contemplates the submission of one inventory and one account and not periodical accounts, *Chandra Kumar v. Prosunno*, 48 Cal., 1051 : 33 O.L.J. 451 (456) : 26 C.W.N. 977 : 64 I.C. 997 (cited at p. 499, ante). Therefore, an order directing submission of annual accounts is bad, *Jayat Durlav v. Indu Bhushan*, 44 I.O. 58 (Cal.). Likewise, orders providing for future administration or directing repairs or half yearly accounts are outside the scope of this section, *Noiandas v. Krishnbari*, 12 S.L.R. 27. 47 I.C. 750. The fact that the testator gave a direction to the executors to prepare annual accounts will not enlarge the Judge's power, although he might authorise persons interested in the estate to take action. Once the accounts are filed and accepted, the Judge has no power to call for further accounts of subsequent years. If the accounts filed at the end of one year be found to be false, the Court can take action under sub-sec. (4), *Sarat Sundari v. Uma Prasad*, 31 Cal. 628 : 8 C.W.N. 578. Cf. A.I.R. 1980 Oudh, 424. The District Judge has no power to institute a judicial enquiry by an audit of the inventory or account at the expense of the executor ; nor can such authority be implied from the provisions of the C.P. Code as to the appointment of a commissioner to examine accounts, *Ibid* ; also *Shanker*

Lal v. Girja Patti, 1961 All. L.J. 707 (no auditing). The judge is to see whether the accounts are *prima facie* accurate and for this purpose can have inspection of them by himself or by some one of his staff, *Ibid*. The accounts are to be filed within one year though the Judge can in his discretion enlarge the time. *Chandra Kumar's case, supra*. As to penalty for non-compliance with the judge's requisition and the necessity of holding a preliminary enquiry prior to prosecution, *vide infra*. The liability of the executor under this section is *qua* executor. Therefore, discharge of his liabilities hereunder does not exonerate him from Executor's liability for his liability to render accounts as a co-sharer, showing how accounts.

he has dealt with the property of his co-sharers in his possession. *Mahomed Renu Meah v. Sabida*, 28 C.W.N. 668 : 49 I.C. 128 ; nor does it absolve him from the liability to make good the money misappropriated by him, *Krishna Lal v. Emperor*, 33 C.L.J. 252 : 60 I.C. 791. If the beneficiary thinks that the executor has been misappropriating money and submitting untrue accounts he may file an application for revocation, 66 C.L.J. 886 = A.I.R. 1938 Cal. 294 = 174 I.C. 951. This case is open to the comments made in relation to 48 C.W.N. 754—noted at p. 628, *post*. If waste and misappropriation are established an order for rendition of accounts against the executor can be made in an administration suit, *Dayamoyee Dassya v. Jatindra Chandra Das*, 63 C.L.J. 204 = A.I.R. 1937 Cal. 28 = 168 I.C. 410. In a suit for accounts and administration against executors, a general order directing that as between them each will be responsible to the other for the consequences of his conduct is not proper. The devastation by one executor will not be reckoned against his companion unless the latter is a contributory to the former's misdeed and all liabilities should be apportioned on individual basis against the wrong-doers severally, *Hari Hari Sinha v. Hari Chaitanya Sinha*, 40 C.W.N. 1237. A party claiming accounts from an executor for wilful default has the burden of proof on him to show not only loss but also the culpability of the default leading to the loss, *Ibid*. The heirs of an executor are not liable to render accounts for the period during which the executor was alive, *Mahomed Hussain v. Haji Allah Baksh*, A.I.R. 1935 Pesh. 82 = 161 I.C. 481 ; but if after the executor's death, the heirs go into possession, they take upon themselves the obligation to render accounts as from the date of death of the executor ; but the heirs not participating in the matter incur no liability, *Ibid*. Filing of accounts hereunder does not bar a regular suit for accounts (or administration) by the aggrieved party, *Santiram Das v. Prosad Das*, A.I.R. 1952 Cal. 368. Though the accounts of an administrator *pendente lite* are passed and he is discharged, that will not bar a suit for accounts against him, *Kshatish v. Cimond Beely*, 39 Cal. 67 : 16 O.W.N. 516—reversing 15 C.W.N. 682 ; *v.d.e* at p. 4f4, *ante*. The Court has no jurisdiction to check the accounts of the executor and to direct him to deposit the money in his hand in Court, *Tremothanath v. Gourdas Mahato*, 66 C.L.J. 386 = A.I.R. 1938 Cal. 294 = 174 I.C. 951 ; nor has it jurisdiction to compel the executor to bring the funds in his hands to Court for the purpose of investment ; therefore, an order imposing fine for failure to comply with the requisition for production of

the amount is also without jurisdiction, *Khetter Mohan v. Saromoni*, 12 C.L.J. 602. As to the liability of an executor mixing up the deceased's funds with his own, see *Flockton v. Bunning*, L.R. 8 Ch. 828.

In one case, the Calcutta Court has held that the executor's liability to render accounts under this section is not limited to one year in every case. Where the executor has omitted to file accounts for the statutory year or to obtain Belated filing of extension of time from the Court, the Court will have power accounts—if the period to call for accounts for the entire period from the date of exceeded the statutory the grant down to date, *Hiralal Chakraborty v. Jilan Kumar Chakraverty*, 48 C.W.N. 754. The ratio decidendi of this case

is not at all convincing; nor does it seem to have taken into full consideration the legal position enacted in sec. 307 of the Act or established in the above-mentioned case law. This case also overlooks the following four outstanding facts: (i) the Executor is not the Court's man but the testator's pet and trusted nominees, (ii) the executor's liability for accounts is to the beneficiary and not to the Court, (iii) subject to the reservation in favour of the High Court under secs. 301 & 302 the Court has very little correcting authority over the executor, (iv) As regards the accounts, the Court is scarcely better than a mere postal agency between the executor and the beneficiary. Read *Chheda Lal v. Ram Dulari*, 7 O.W.N. 616—A.I.R. 1930 Oudh, 424, *infra*, and Comp. *Re Nangappa Asari*. (1958) 2 M.L.J. 280.

This section has cast certain duties on the executor and until these statutory duties are performed, he is not divested of his character as such. Burden of proof is always on the executor to show that he has performed all these statutory obligations, *Gulati v. Reeves-Brown*, 41 P.L.R. 872—A.I.R. 1989 Lab. 468.

Assets :—The term is not confined to any particular kind of property, but includes all property which is chargeable with the debts and legacies, *Amitanath v. Administrator-General*, 25 Cal. 54 (58); *Re Cowyan*, 25 Cal. 65; *Walkins v. Sarat Chandra*, 31 Cal. 572. Cf. *Kushroo v. Hormazsha*, 11 Bom. 727; *Re Hyatt*, 88 Ch. D. 609; also 7 M.L.J. 123. Acquisitions by the executor with the assets of the estate come within the meaning of the term, *Ganada v. Nalini Ranjan*, 36 Cal., 28.

Requisition of accounts or inventory by Parties :—An executor who has not proved the will can call upon his co-executor who has proved to exhibit an inventory or accounts in Court, *Jehangir v. Ba: Kukibai*, 27 Bom., 281. The legatees has a right to inspect accounts and if that is denied to him or if he is dissatisfied with them, he can file an administration suit, *Hemandas v. Chellaram*, 9 S.L.R. 134: 32 I.C. 554; *Cl. Law v. Bonverse*, 8 Ch. 82; *Lee v. Wilton*, 1 Ch. 86, or seek his remedy in the Criminal Court against the executor or administrator if misappropriation is detected, and the mere fact that accounts have been filed in, and

passed by, the Probate Court, does not absolve the delinquent from liability, *Krishna Lal v. Emperor*, 88 C.L.J. 262 : 60 I.C. 791; *Moraaji v. Bas Panbai*, 29 Bom. L.R. 683 - A.I.R. 1927 Bom. 438. As to the right of a co-sharer to call for accounts from the executor who has been in possession of the property of such co-sharer, see *Mahomed Renu Meah v. Sabida*, 28 C.W.N. 668 : 49 I.C. 128. The practice of the Bombay High Court is to require the executor taking out probate to file an inventory and accounts with the Testamentary Registrar and not with the commissioner for taking accounts, *Moraaji v. Bas Panbai*, 29 Bom. L.R. 683 - A.I.R. 1927 Bom. 438.

Which Court to demand inventory &c.:—It is the Court which granted the probate or administration that has jurisdiction to demand inventory &c under this section. Such jurisdiction is not taken away by the inclusion of the deceased's property in another district as a result of bifurcation of the original district, *Subramana v. Ramaswami*, 31 I.C. 499 (Mad.), cited at p. 515, ante.

Court's power of directing audit of accounts:—The Court has no power under this section to direct audit of the accounts or to direct local enquiries about income and expenditure of the property. It can only see whether the accounts and inventories filed, *prima facie* fulfil the requirements of the law, *Chheda Lal v. Ram Dulari*, 7 O.W.N. 616 - A.I.R. 1930 Oudh, 424.

Court's duty under this Section:—If the Court finds that the executor is not administering the estate and is not in possession of the property which has already been taken charge of by the legatee, the Court should not make any order for accounts hereunder, *Santiram Das v. Proshad Das*, A.I.R. 1952 Cal 356.

Costs:—The costs of the proceeding to compel production of accounts etc. is to be borne by the executor if he is guilty of laches, omission etc., *Re Jetha Padamsi*, 7 Bom. L.R. 467. Cf. *Re Skinner*, (1904) 1 Ch. 298.

Omission to exhibit inventory or accounts, if is a ground for Revocation:—As to whether such an omission is a "just cause" within the meaning of sec. 263 (e), vide notes at p. 498, ante; see also *Khetstrom v. Saromoni*, 12 C.L.J. 602; A.I.R. 1952 Cal. 368 (*supra*); the mere omission to file an inventory or accounts is no ground for revocation, *Bal Gangadhar Tilak v. Sakwarbas*, 26 Bom. 792.

Inquiry for valuation upon inventory:—Under sec. 19H of the Court Fees Act the Collector can require the petitioner for grant to give proper valuation of the property, and in default, can move the Court to hold an enquiry for correct valuation, but such motion must be made within six months from the date of the exhibition of inventory under this section, see *Bhubaneswar v. Collector of Gaya*, 41 Cal. 556; 18 C.W.N. 153; 19 C.L.J. 136, *supra*.

Extent of liability:—*Vide Baroda Prasad v. Gajendra*, 9 C.L.J. 383 : 13 C.W.N. 567. It must have been seen from the notes at p. 627, ante, that ordinarily, the executor's liability for accounts is to the beneficiaries under the will, but under secs. 301 and 302, the High Court possesses certain powers over the executor or administrator. No, when proceedings are taken under those sections either *suo motu* or on the motion of a party, the High Court will have power to examine or scrutinise the accounts filed under this section with a view to ascertaining whether or not the executor has so misconducted himself as to warrant his removal. *Gulati v. Reeves-Brown* 41 P.L.R. 872 = A.I.R. 1939 Lab. 469.

Limitation for suit for accounts against Executor:—See *Soroda Prasad v. Brojo Nath*, 5 Cal. 910; *Hemangini v. Nobin*, 8 Cal., 788; *Baroda v. Gajendra*, 9 C.L.J. 383 : 13 C.W.N. 567; *Saphurji v. Bhikaji*, 10 Bom., 242; *Gajanan v. Waman*, 12 Bom. L.R. 681; *Ayeshabai v. Ibrahim*, 82 Bom., 864.

Sub-sec. (3): Penalty for non-compliance:—An intentional omission to comply with a requisition by the Court to exhibit an inventory or accounts amounts to an offence under sec. 176 of *I.P.O. Khetter Mohan v. Saromoni*, 12 C.L.J. 602 (604); *Santaram Das v. Prasad Das*, A.I.R. 1952 Cal. 368; but no prosecution should be ordered without an enquiry as to whether the default was intentional. *Naba Chandra v. Tripura*, 2 C.W.N. 597.

Sub-sec. (4): Penalty for false inventory and accounts:—The exhibition of an intentionally false inventory or accounts is an offence under sec 198, I.P.C. and punishable as such. But no prosecution should be ordered without an enquiry whether the inventory or accounts filed were intentionally false. *Naba Chandra v. Tripura*, 2 C.W.N. 597. Cf. *Krishnalal v. Emperor*, 33 C.L.J. 252 : 60 I.C. 791.

318. [Pro. S. 99 & Suc. S. 277A] In all cases where a grant has been made of probate or letters of administration to include property in any part of India intended to have effect throughout India, the executor or administrator shall include in the inventory of the effects of the deceased all his moveable and immoveable property situate in India, and the value of such property situate in each State shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within India.

This section is necessary in view of the provisions of sec. 278, *supra*, *vide* the notes thereunder. Note the use of the word "effects". Under this section the value of the properties in each State should be separately stated. For the definition of State, *vide* sec. 2 (g), ante.

Court-fee:—Now, as the different States have different scales of Court fees, a question may arise whether the fee is to be calculated on the properties in each State according to the scale prevailing therein. But as the section requires one fee on the "entire amount," we are apt to think that such fee is assessable according to the State scale of the place where the grant is applied for.

319. [Pro. S. 100 & Suc. 278] The executor or administrator As to property of, shall collect, with reasonable diligence, the pro- and debts owing to, perty of the deceased and the debts that were due deceased to him at the time of his death.

General Notes:—This section and the next four sections of the Act deal with the primary duties of the executor or administrator and lay down what he should do immediately upon assumption of office in furtherance of the work of administration. His first duty is to collect the assets and then to apply them in paying off the obligations and debts of the estate. Sections 319 to 321 regulate the claims of priorities *inter se* among the various kinds of creditors and do not propose to regulate the rights of creditors against the Estate. *Joseph Suspirasadam v. Subramania Chettiar*, (1937) 1 M.L.J. 447=1937 M.W.N. 198=45 L.W. 875=A.I.R. 1937 Mad 484=170 I.C. 157 In applying the assets of the deceased in discharge of his obligations, the executor or administrator should approach his task with the knowledge of the responsibilities that law has imposed on him. He should bear in mind that the Sovereign Union enjoys a priority in respect of its dues from the deceased over all other creditors of the latter, so it is his duty to pay off the outstanding taxes first of all before he can turn to think of the other creditors. *U Ba Thi v. Administrator-General, Burma*, 1939 Rang. L.R. 701=A.I.R. 1940 Rang. 36=186 I.C. 684.

Time limit for realisation:—The section obliges the executor or administrator to collect the assets of the deceased with *due diligence*, but there is no time-limit for the purpose. *Hughes v. Empson*, 22 Beav. 181.

Shall Collect:—The section is imperative. If for the purposes of such realisation a suit is necessary, the executor will have full right to carry on the suit. *Sheik Mussa v. Sheik E.a.* 8 Bom. 241. For this purpose he can adjust the testator's accounts with a Bank and can allow set-off, *Pocock v. Delhi Bank*, 36 Cal., 217. *Vide* under the heading "Arbitration" below. For the duty of an administrator, who succeeds an administrator *durante minoritate*, to collect the unadministered effects, see *Baroda Prasad v. Gajendra*, 9 O.L.J. 383: 13 C.W.N. 557.

Property of the deceased:—It is the same thing as assets, i.e., notes at p. 628, *ante*, and *Re Courjan*, 26 Cal., 66.

With reasonable diligence :—Though there is no time limit for the purpose, still the executor should not make any unnecessary delay in collecting the assets, *Greenwood v. Firth* 13 L.J. 293; *Wightwick v. Lord*, 6 H.L.C. 226; *Grayburn v. Clarkson*, L.R. 3 Ch 606; *Styles v. Guy*, 1 Mac & G. 422; *Candler v. Tillett*, 22 Beav. 257; *Re Gasquino*, (1894) 1 Ch 470; *Re Pink*, (1912) 1 Ch 498. He is liable for all losses resulting to the estate from want of diligence on his part, *Re Brier*, L.R. 26 Ch D. 298; *Lakshmidhand v. Kuverbai*, 29 Bom., 170. Vide also *Hayward v. Kinsey*, 12 Mad., 573; *Powell v. Evans*, 5 Ves. 839; *Jones v. Lewis*, 2 Ves. Sen. 240; *Fry v. Fry*, 27 Beav. 144. See also see 868 *infra*. For keeping monies in unauthorised securities, see *Dhupati v. Andoor*, 33 I.C. 604 (Mad.).

Breach of Trust :—If the executor commits any breach of trust in respect of the properties in his hands, he is liable to make good the loss to the beneficiary, *Purshottam v. Kala Govindji*, 26 Bom. 301.

Duty of Executor who is a Debtor :—Where the executor is a debtor to the estate, he is accountable for the amount of his debts to the estate, *Administrator General v. Kisto Kamuni*, 31 Cal. 519: 8 C.W.N. 500 (on appeal from 7 C.W.N. 476); *Yacub v. Bai Rehimat*, 10 Bom. L.R. 346. When the debtor becomes the executor, the debt is extinguished and is converted into assets in his hands, 31 Cal. 619, *supra*. *Chinna v. Venkata Subba*, 33 M.L.J. 195: 6 L.W. 85: 41 I.C. 605.

Position of Executor who is a Creditor :—If the executor is a creditor of the estate, the debt is extinguished, vide under the last paragraph, the assets in the executor's hand being considered payment to him, *Wankford v. Wankford*, (1700) 1 Hawk. 304. Cf. *Woodword v. Lord Dorey*, (1555) Plowd., 184. But it has been held in India that where one of two mortgagees became an administrator, the debt was not extinguished and the other mortgagee could enforce his claim by a suit, *Hossainara v. Rahamanneisa*, 38 Cal., 342. Cf. *Tamman Singh v. Lachmin*, 26 Al., 318; *Sitaram v. Shridhar*, 27 Bom., 292; *Harhan v. Bholi Pershad*, 6 C.L.J. 393 (994); *Powell v. Brodhurst*, (1901) 2 Ch., 160.

Arbitration :—An executor or administrator is, under certain circumstances, for example, for the settlement of any debt, account or claim in relation to the estate in his hands, competent to make a reference to arbitration; such right cannot be disputed when exercised within the limits of his authority, *Soudamini v. Gopal Chandra*, 21 C.L.J. 273, referring to *Bran v. Farman*, (1828) 6 Pickering (Mass.) 269. But an executor cannot make a reference to arbitration with the avowed purpose that the terms of the will may be modified and arrangements for the management and distribution of the estate contrary to the direction of the testator may be made, *Ibid*. Where the executor referred certain questions including the construction of the will itself to arbitration without obtaining probate, the award

passed on the reference was held to be invalid as it nullified the intention of the testator, *Jnanendra Nath Mukherjee v. Jitendra Nath*, 32 C.W.N. 108 - A.I.R. 19.6 Cal 275 - 107 I.C. 70

320. [Pro. S. 101 & Suc. S. 279] Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, shall be paid before all debts.

Expenses to be paid before debts — These are (a) Expenses of a fitting funeral (*vide* notes and cases under sec 316, *supra*), (b) Death-bed charges, including fees for medical attendance, nurses' fees, hospital charges etc (c) Board and lodging, only for one month previous to death Of sec. 54 of the Administrator-General's Act (III of 1913) These expenses do not cover expenses of *Satnua Karon Siach, Kili Kumar v. Rask Vehar*, 1 L.R. (1947) 2 Cal 195

Court fees — For the purposes of duty the above expenses may be deducted, *vide* 5 in III of the Court Fees Act

321. [Pro. S. 102 & Suc. S. 280] The expenses of obtaining probate or letters of administration including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges.

Executorship Expenses — The expenses incurred for the purpose of obtaining a grant or for carrying on judicial proceedings for the purposes of administration, *Sharp v. Lush* 10 Ch D 468, *Khusruhain v. Harmuya*ha, 17 Bom., C87 and include the costs of an administration suit, *Penny v. Penny* 11 Ch D 440 and the cases cited under the heading, 'Administration suit' below; and also include the amount paid by the executor or administrator to his surety, *Imam Bahadur v. Abdul Rahim*, 193 P.L.R. 1906 31 P.R. 1906 Such an amount is an expense in administering the estate within the meaning of this section, *Ibid* such expenses are also called "testamentary expenses" and come after the funeral expenses and death-bed charges in order of priority The expression "expenses of obtaining probate" as used in this section will include the costs incurred by a party who though a necessary party, was not cited in the probate proceeding, in connection with his application to recall the probate and have the will proved in solemn form and such "expenses" will have to be paid next after the funeral expenses and death-bed

charges. *Sarat Chandra v. Pramatha Nath*, 87 C.W.N. 113 = A.I.R. 1948 Cal. 482 =

Advances of testator. 145 I.C. 295. A creditor advancing the testamentary expenses—expenses—right is not entitled to any charge against the estate, but, in a respect of.

proper case, is entitled to stand in the shoes of the executor for the purpose of recovering his advances from the estate and to claim the benefit of the executor's indemnity against the estate. *Subramania Chettiar v. Joseph Sarpravalan*, (1939) 2 M.L.J. 316 = (1939) M.W.N. 733 = A.I.R. 1939 Mad. 817.

Administration Suit. —The words "judicial proceedings that may be necessary" seem to refer to administration suits. *Khusrulhai v. Hormujsha*, 17 Bom. 637. Cf. *Sanderson v. Stoddart*, 92 Beav. 165. The Executorship or "testamentary" expenses will include the costs of such a suit, *Miles v. Harrison*, L.R. 9 Ch 916; *Hanlac v. Havloc*, L.R. 20 Eq. 271; *Re Clemow*, (1900) 2 Ch. 182; *Penny v. Penny*, *supra*. The losses resulting to the estate from the administrator's fault or neglect are to be made good by him, and he will have to pay the same, of course deducting therefrom the cost of obtaining letters or necessary judicial proceeding. *Khusrubai's case*, *supra*. For the nature and scope of an administration suit, see *Bai Mahabai v. Magan Chandra*, 29 Bom. 96 and *Dhuniaj v. Broughton* 15 B.L.R. (O.C.) 296; *Sasibhusan v. Manindra Chandra*, 44 Cal. 890 = 24 C.L.J. 448 = 21 C.W.N. 310; *Hasanali v. Sopatla*, 37 Bom., 211 = 14 Bom. L.R. 782 = 17 I.C. 17; *Motibhai v. Nathabai*, 45 Bom., 1053 = 23 Bom. L.R. 444 = 61 I.C. 24. Administration suit may be brought by a creditor on his own behalf as well as on behalf of the other creditors, or by a legatee or the next-of-kin or the heir-at-law. Cf. *Bai Mahabai v. Magan Chandra*, *supra*. If there is any apprehension of irreparable waste, such a suit can be instituted even before the expiry of 6 months from the date of grant, *N. Ghose v. B. B. Dasi*, (1922) Cal. 802; but there must be some good ground for bringing the suit before the period of six months, *Ibid.* An administration suit by one creditor on behalf of others should be instituted with the leave of the Court, *Oriental Bank v. Gobind Lall* 9 Cal. 604. As to what is meant by an administration suit, read *Amir Bi v. Abdul Rahim*, 55 M.L.J. 266 = A.I.R. 1928 Mad. 760 = 110 I.C. 276. The object of such a suit is generally to have the estate of the deceased administered under a decree of the Court. The suit in its essence, is one for an account and for application of the assets of the deceased's estate for satisfaction of the debts of his creditors. *Shriaprasad Singh v. Prayag Kumari Debi*, 61 Cal. 711 = A.I.R. 1926 Cal. 89 = 164 I.C. 479. A suit for recovery of possession by an heir of the deceased is not an administration suit, *Ibid.* If the plaintiff creditor is paid off his dues and costs, the suit is liable to be dismissed, *Sasibhu an v. Munindra Chandra*, 24 O.L.J. 448 (*supra*). The costs of an administration suit are to be paid out of the estate as between party and party, if there are sufficient assets. *Webb v. De Beauvoisin*, 81 Beav. 173; *Iswardas v. Chandip*, (1910) M.W.N. 120 : 7 M.L.T. 400 : 6 I.O. 267. The principle will not apply unless the suit was necessary within the meaning of this section, see

Barlett v. Wood, 9 W.R. (Eng.) 817; *Godwin v. Prince*, (1698) 2 Ch. 225; *Of. Surendra v. Munavilal*, 48 Cal 352 : 24 C.W.N. 188 : 69 I.C. 581. For decree in an administration suit, see O xx, r. 18, C.P. Code, 1908; also *Firm of Shyam Lal v. Jamil Ahmad*, 74 I.C. 487 (Pat.). The result of an administration suit is final (subject to an appeal therefrom) as between the parties to the suit and as to the construction to which it gives effect to, *Gopal Lal v. Purna Chandra*, 49 I.A. 100—49 Cal 459—36 C.L.J. 57—27 C.W.N. 174 (P.C.). For priority of Government debts, see *Bank of Upper India v. Administrator-General*, 45 Cal., 668 : 22 C.W.N. 798; *Geribala v. Bejoy*, 88 Cal., 1040.

Costs of Probate proceedings:—As a general rule the costs of a Probate proceeding are to come out of the estate, as most litigations spring from the fault of the testator, *Charter v. Charter*, (1874) L.R. 7 H.L. 864; *Baroda Prasad v. Gajendra*, 9 C.L.J. 383 : 18 C.W.N. 667 : 1 I.C. 289. Where the difficulty has been created and litigation rendered necessary by the act of the testator, for instance, by reason of the ambiguity or inconsistency in the provisions of the will, it is proper to direct that the costs of all parties, successful or unsuccessful should come out of the estate *Srinivas v. Monmohini*, 3 C.L.J. 224. The above principle will not apply where the litigation is not attributable to the so-called fault of the testator, *Aghorenath v. Kamini Deb*, 11 U.L.J. 461. Costs are payable from the estate also when the litigation takes its origin from the fault of persons interested in the residue or if there is sufficient ground to question the validity of the will, *Baroda Prasad's case, supra*. Cf. *Mitchell v. Gard*, 3 Sw & Tr 275; *Re Taramoni Dutt*, 25 Cal., 663; *Godacre v. Smith*, L.R. 1 P & D, 819; *Ferry v. King*, 3 Sw & Tr. 51; *Hillam v. Walker*, 1 Hagg. 76; *Williams v. Henry*, 3 Sw & Tr. 471; *Spiers v. English* (1907) P. 192; *Khusrubhai v. Harmujsha*, 17 Bom., 637. The costs will come out of the estate and be not realised from the losing party, where there is a reasonable doubt as to the testamentary capacity of the deceased, *Friar v. Peacock*, 1 Rob. 456. The unsuccessful party will not be condemned in costs if there are suspicious circumstances to evoke a *bona fide* contest, *Wilson Barre*, (1903) P. 269; *Haydon v. Priy*, (1919) P. 131. Costs will fall on the estate also when the contest turns upon the exposition of a very difficult and doubtful point of law, *Robins v. Dolphin*, 1 Sw. & Tr. 518; *Indra Kumar v. Jaspal*, 15 I.A. 127 : 15 Cal. 725; but where the construction of the will is not so difficult as to require the assistance of the Court, the costs should not come out of the estate, *Narayani v. Administrator-General*, 21 Cal., 683. The heirs of a testator can always insist upon an adverse will being proved in solemn form, and should not be saddled with costs on that account, *Matungam v. Hurru Prasad*, 24 W.R. 25. The residuary estate is primarily liable for the costs of probate, *Dayalhai Tapidas v. Damcdardas*, 21 Bom., 75. A beneficiary who successfully resists an attempt by another beneficiary to prove a false will is not entitled, as a matter of right, to be paid his costs out of the estate; the costs are in the discretion of the Court and may be directed to be paid out of the estate in a

suitable case, *Baroda Prasad v. Gujendra* 9 C.L.J. 383 : 13 C.W.N. 557 : 1 I.C. 289, *Banick Das v. Brige Coomari*, 5 C.W.N. cxli. An unsuccessful party cannot however avoid his liability for costs simply because there is *justa causa litigandi*. *Barwick v. Mullings*, 2 Hagg. 284; *Nichols v. Binns*, 1 Sw. & Tr 239. An applicant for grant will be liable for costs if he knowingly advances a false claim, *Clarkson v. Waterhouse* 29 L.J. P. & M 186, or wilfully suppresses the names of near relations, *Re Nathubai*, 2 Bom, 9. As to the other circumstances in which a party at fault will be asked to pay his own costs, see *Davis v. Gregory*, L.R. 8 P. & D 28. For the costs of an administration suit, see *Miles v. Harrison* L.R. 9 Ch. 316; also under the heading, "Administration suit," *supra*. A legatee proving the will, is entitled to his costs out of the estate, *Sutton v. Drax*, 9 Philim. 328; *Williams v. Goude*, 1 Hagg 610. Where probates of two inconsistent wills were successively granted to two persons each of them was held entitled to costs from the estate, *Re Taramani*, *supra*. The parties should however bear their own costs where the estate is insufficient, *Ibid.*

Plaunders' fees—*Vide* notes at p. 574, *ante*, also *Protab Chundia v. Kalu*, 4 C.W.N. 600, *Bajnath v. Sham Sundar*, 41 Cal. 687 = 18 C.L.J. 643, cited there. C.I. 6 C.L.J. 453

Remuneration of Executors—*Vide* at p. 617, *ante*. Also read *Aksloy K. Ghose In re*, A.I.R. 1949 Cal. 462

Position of creditor lending expenses of probate to executor—This section does not declare a charge on the estate in favour of the lender for the amounts of probate expenses advanced by him to the executor. The lender's right is to be subrogated to the rights of the executor and to utilise the executor's indemnity against the estate, *Joseph Sarprasadam v. Subramania Chettiar*, (1987) 1 M.L.J. 447 = 1987 M.W.N. 138 = 45 L.W. 375 = 170 I.C. 157, read the notes at p. 616, under the heading, "General Notes."

322. [Pro. S. 103 & Suc. S. 281] **Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).**

N.B.—"The words added have been taken from sec. 103 of Act V of 1881"—*Joint Committee Report*; and have been considered necessary by reason of the decision of *Nil Komul v. Read*, 17 W.R. 518 : 12 B.L.R. 287.

Wages—Wages for the services specified in the section within three months prior to death, come third in order of priority. Cf. secs. 320 and 321, *supra*.

Domestic Servants :—Ordinarily the expression means a servant in the testator's domestic establishment, *Ogle v Morgan*, 1 De G. M. & G. 369, as distinguished from an out-door servant, *Re Lowson*, (1914) 1 Ch. 682. But having regard to Indian conditions of living a wider scope has been given to it, so as to include a *dhobi*, *Bhim Das v. Upendra*, 9 B.L.R. App. 4; or a *Servant*, *Dhanno v. Upendra*, 8 B.L.R. (O.O) 244 (250); but not a *darzi* (tailor), *Vithoba v. Corfield*, 8 B.H.C.R. App. 21. As to bequest to "domestic Servants" like chauffeur, coachman Gardener etc read *Jackson v Hamilton*, (1928) 2 Ch. 365, C.A.

Labourer and Artizan :—See *Re Domestic Servants*, 3 B.L.R.A.C 92. *Vide* the case of a tailor, *supra*.

Government Debts :—Read the notes under the heading, "General Notes" at p. 681, *ante*; also the notes under the heading "Government Debts" at p. 640, *post*

323. [Pro. S. 104 & Suc. S. 282] Save as aforesaid no creditor Save as aforesaid, all shall have a right of priority over another ; but debts to be paid equally the executor or administrator shall pay all such and rateably debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.

N.B.—"The words* omitted are merely explanatory and are not to be found in sec 104 of Act V of 1891"—Joint Committee Report.

Object of the Section :—The object is to prevent any one creditor from obtaining an unfair advantage over another creditor, and to provide for the payment of all claims proportionately out of the assets of the estate. *Christnath v. Administrator-General*, 26 Cal., 54 : 1 C.W.N. 500. The Law Commissioners have thus formulated their reason, "We do not propose to extend to India the rule which enables an executor to pay any creditor (whether himself or another person) in preference to another creditor of equal degree. We have provided that funeral and death-bed expenses and charge of probate and administration are to be first paid ; then wages due to any labourer, artizan or domestic servant employed by the deceased ; and that in respect of no other debt shall a creditor be entitled to a preference either by reason of its being secured by deed under seal or on any other account." The Bombay Court calls the rule enacted in this section a mere rule of procedure [*Kisondas Premchand v. Jitatlal Pratapshs & Co.* 88 Bom. L.R. 864 = A.I.R. 1936 Com., 428-167 (C. 529)], but it seems that the rule involves a question of substantive right also.

* Sec. 282 of the Repealed Succession Act contained the words, "by reason that his debt is secured by an instrument under seal or on any other account" after the word "another." These words have been omitted for the above reason.

Rights of the Testator's Creditors:—The section deals with the creditors' rights as regards the general assets of their deceased debtor, and lays down that (apart from any question of lien,) no creditor will have any priority over another creditor, and that all claims against the estate will be equally and rateably paid, *Omritanath's case, supra*. *Hannanabalu v. Cook*, 6 M.H.C.R. 846; *Benfry v. De Penning* 10 Cal., 929. The debt secured by a lien on property however stands on a different footing inasmuch as the executor or administrator takes the property subject to the charge. *Dialu Mal v. Bryan*, 11 P.R. 1878. Cf. *Ambica Charan v. Mukta Keshi*, 10 C.W.N., 88 : 2 O.L.J. 188. Where the testator himself directs that a particular debt is to be paid out of a particular property, such property is to be considered as given upon trust to pay that particular debt, and the executor will be competent to pay that creditor out of that property; but there will be no such trust where the direction in the will is to pay the debts out of the assets generally, *Ram Dham v. Mahesh* 9 Cal., 406; *Anundawoyi v. Gرش Chandra* 7 Cal., 772; (on appeal, 14 I.A. 137 : 16 Cal., 66). Cf. *Milnes v. Slater*, 8 Ves. 246; *Re Gronigis*, (1900) 2 Ch. 775; *Cama u v. Administrator General*, 29 Mad. 290. The executor or administrator shall pay all the debts (of which he has had notice) equally and rateably. If the assets are insufficient, he is not justified in paying certain creditors in full leaving others unpaid. *Ibid.* He has no power to prefer one creditor to another or to mortgage the estate or any part of the assets for making any payment in excess of the rateable and equal payment due to the creditor. The mortgage in such preference does not bind the rest, *Mathuradas v. Raimal*, 37 Bom. L.R. 642-A I.R. 1935 Bom. 985-159 I.C. 583. The rateable payment referred to in the section is payment out of the assets generally. This does not mean payment out of the net income of the property or any specific part of it, *Omritanath's case, supra*. Question of rateable payment arises only where the assets are insufficient, *Ibid.* As to the liability of a purchaser from a devisee of a part of the estate in lieu of debts due from the testator, see *Greender Chander v. Mackin'osh* 4 Cal. 897. An executor has ordinarily no right to create obligations in favour of a creditor, *Mahan Bibee v. Shyama Bibee* created in favour of *Bibee*, 0 Cal., 987; 7 C.W.N. 749. Cf. *Cassbar v. Ranendus*, 4 Bom. 5; *Pyramji v. Heerabai*, 11 Bom. L.R. 260 : 2 I.C. 161. Therefore, where assets are not sufficient to pay all the creditors in full, if the executor executes a mortgage in favour of one creditor in discharge of the whole debt due to him, that will be a manifest breach of trust within the meaning of this section, *Mathuradas v. Raimal*, 37 Bom. L.R. 642-A I.R. 1935 Bom. 985-159 I.C. 583.

Creditor's remedy:—The creditor can bring an administration suit, if he is not fully paid, *Sarzmoni v. Battu Krishna*, 35 Cal., 1100. Cf. *Bai Meherbai v. Magan Chand*, 29 Bom., 96. Where one creditor is discharged in full to the prejudice of the other creditors by means of a mortgage to the favoured creditor, the aggrieved creditors can sue for a declaration that the mortgage or the decree on

that mortgagee are not binding on them and that the favoured creditor will not get any sort of priority over them but rank *pari passu* with them *Mahuradas v. Raimal*, 37 Bom., L.R. 642-A I.R. 1985 Bom. 385-169 I.C. 688. The executor is not a necessary party in such a suit.

Decree-holder's position:—The section does not affect the Judgment-Creditor, and does not preclude him from having his claim satisfied, under sec 52 of the O. P. Code, out of the assets of the deceased debtor to the exclusion of other creditors after deducting the expenses referred to in secs 370-322, *supra*, *Nilkomal v. Reed*, 19 B.L.R. (A.O.) 827 : 17 W.R. 513; *Mo Min v. Shunmugam*, 5 Bur. L.T. 288 : 6 L.B.R. 158 : 18 I.C. 510; *Venkatarangayam v. Krishnasami*, 22 Mad. 194; *Remfry v. De Penning* 10 Cal 929. For this reason where an executor attempted to resist the execution by a decree-holder on the ground that he (the executor) was not bound to make any payment before one year, the Court said that the C.P. Code had made no provision for carrying out the theory of this section, and therefore execution under the Code could proceed, *Abdool v. Ryrie*, 70 P.R. 1871. But the correctness of the rule that the decree-holder can execute his decree to the prejudice of other creditors as enunciated in *Nilkomal's case* (17 W.R. 513, *supra*) has been doubted by the Bombay High Court in *Bas Meheratas v. Magan Chind* 29 Bom., 96. In this case a decree was obtained by a creditor against a previous administrator who satisfied the decree by the sale of a portion of the estate with the sanction of the Court under sec 257 A (omitted from the present O.P. Code) of the Code of 1892, and the Court held that the decree and the sale were binding on the subsequent administrator, not because of the rule enunciated in *Nilkomal's case*, but on the principle of *res judicata*, and that a creditor's suit was in the nature of an administration suit. A more recent Bombay decision has held that the section is applicable to judgment-creditor seeking to execute his decree against the estate in the hands of the legal representatives of the deceased, *Ksesondas Premchand v. Jivatmal Pratapsi & Ors.*, 38 Bom. L.R. 864-A.I.R. 1936 Bom. 429-167 I.C. 529. The judgment creditor who obtained his decree against the heir in possession of the estate cannot follow the estate in the hands of the executor, but he can base a suit against the executor on such judgment (against the heir) praying to have his decree satisfied, *Prosunno Chandra v. Krishnachurnya*, 4 Cal. 342, cited at p. 376. The judgment creditor has however no right to go beyond the terms of his decree. Thus, where an administrator had obtained a decree against the deceased and the decree did not provide for the payment of interest, he was not entitled to pay himself any interest out of the estate, *Dilu v. Bryan*, *supra*. Mere attachment before judgment will not entitle the creditor to payment otherwise than rateably with other creditors *Hanninalal v. Cook*, 6 M.H.C.R. 346.

Right of Retainer:—Under the English Law an executor or administrator can pay any creditor in preference to the others, *Lyttleton v. English Law.* *Cross*, 3 B. & C. 322; *Re Samson*, (1906) 2 Ch. 684; with the

result that if he himself happens to be a creditor of the estate, he can pay himself before paying any other debt, *Sander v. Heathfield*, L.R. 10 Eq 21, *Franks v. Cooper*, 4 Ves., 763, *Boyd v. Brooks*, 84 Beav. 7 (on appeal, 84 L.J.Ch 605); *Morris v. Morris* L.R. 10 Ch 68, *Crowder v. Stewart*, 16 Ch D 368 See Williams on *Executors*, 11th Ed., p 797, *et seq.* But the effect of this section is to do away with such priority, *vide* the quotation at p 637 *ante*, from the Report of the Law Commissioners. The words "including his own" show that this section recognises the right of retainer but does not give it any right of priority, *Moresh Lal v. Busunt Kmar* 6 Cal., 340 (365), *Arthur v. Stokes*, 2 M.L.C.R. 266; *Hossainara v. Bahamannessi* 38 Oal., 342. There is a right of retainer in respect of all expenses by the executor for which he may re-imburse himself, Right of reimbursement, see *Priya Mohun v. Norandia*, 37 I.A. 17; 17 Cal., 229; 34 U.L.J. 86 (on appeal from 30 U.L.J. 177) Cf. *Godfrey v. Watson* 3 Atk 518, *Waller v. Woodbridge*, L.R. 7 C.D. 504 (in this case the reimbursement was in respect of the cost of defence), *Blackford v. Davis* L.R. 4 Ch 904, *Welby v. Hafslbury* 17 Ves. 460

Liability of Executor de son tort — As to the liability of a person taking possession of the deceased's estate to pay the debts see *Iroonma v. Krishla Chutunno* 4 Cal. 342 (*cited supra* and at p 481) Cf. *Chetha Kellan v. Celinda*, 7 Mad., 186. Rule also the notes under *etc* 303.

Knowledge of debts — The obligation to pay equally and rateably under this section arises only where there is knowledge of the debts. Such knowledge should be *actual* and not *constructive*. The liability to distribute the assets *per passu* is limited to the debts which the executor knows of. *Kesandas Prem-Chiril v. Jivalal Pratapshi & Co.*, 33 Bom. L.R. 864 = A.I.R. 1986 Bom 428 = 167 I.C. 529. So in order to charge an administrator with contravention of the section it must be shown that he actually knew of the debt. *Asian Banking Corp. v. Amzlin* 8 B.H.C.R. 620. Debt here includes a liability to pay a call. *Ibid.*

Barred Debts — An administrator can pay a barred debt. *Talakchand v. Jitammal*, 10 B.H.C.R. 206. *Administrator General v. Hawkins*, 1 Mad., 267, *Norton v. Flescher*, 1 Atk 55, *Stahlscmidt v. Lett*, 1 Sm & G 415, Cf. *Moresh Lal v. Busunt* 6 Cal., 340

Government Debt — The Government is not bound by this section or the preceding one, it enjoys a prerogative right of preference, in the matter of payment of debts from the people and this Act has nowhere encroached upon this prerogative, which unless curtailed by statute always prevails, *U Ba Thi v. Administrator General, Burma*, 1989 Rang L.R. 701 = A.I.R. 1990 Rang 36 = 166 I.C. 684. The Court fees payable with regard to a *forma pauperis* matter form

Government debt, and have precedence over other debts, *Gyanando Bala v. Butto Krishna Bairagi*, 33 Cal. 1040; *Gubpub v. Collector of Canara*, 1 Bom. 7. This is the position in relation to all taxes payable to the Government, *U Ba Thi v. Administrator-General, Burma*, *supra*. For liability to pay income-tax, see *Forbes v. Secretary of State*, 42 Cal., 151. Cf. *Bank of Upper India v. Administrator-General* 22 C.W.N. 793 : 45 Cal. 693. Read the notes under the heading, "General Notes" at p. 581, ante.

324. [P. A. A. of 1889, S. 9 & Suc. S. 283] (1) If the Application of moveable property to payment of debts where domicile not in India. domicile of the deceased was not in India, the application of his moveable property to the payment of his debts is to be regulated by the law of India.

[Suc. S. 284] (2) No creditor who has received payment of a part of his debt by virtue of sub-section (1) shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

(3) *This section shall not apply where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.*

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal leaving moveable property to the value of 5,000 rupees, and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees which are to be distributed rateably amongst all the creditors without distinction, in proportion to the amount which may remain due to them.

N. B.—"This reproduces sec. 283 of the Act of 1865. Neither this section nor sec. 284 has a corresponding provision in the Act of 1881. Sub-clause (3) therefore excludes from the operation of the clause those to whom the Act of 1881 applies"—Notes on Clauses of the Original Bill

Sub-sec (1): Moveables of a person of Foreign Domicile:—Formerly, where the deceased was of a foreign domicile, the application of his moveable property

in payment of his debts was in accordance with his *lex domicili*, but by sec. 9 of Act VI of 1889, the law was changed and such application is now (as hereunder) regulated by the Law of India (Cf. *Kanurenther v. Geiselbrecht*, 28 Ch. D. 792; *Thorburn v. St ward*, 8 P. C. 478), notwithstanding that the distribution of moveables takes place, under sec. 5 (2), in accordance with the law of domicile, inasmuch as this section does not affect the question of succession, but is only confined to the payment of debts, *vide Hill v. Administrator-General*, 28 Cal. 506; *Miller v. Administrator-General*, 1 Cal. 412, both cited at p 33, *ante*. See Williams on *Executors*, 11th Ed pp 764, *et seq.*

Sub-sec (2):—This sub-section lays down that if a creditor has participated in a share in the moveables by virtue of sub-sec. (1), he cannot participate in the immovable properties without bringing in his previous payment into account for the benefit of the other creditors. Cf. *Galton v Hancock*, 2 Atk 436. The principle of this section is very much akin to marshalling which presupposes two claimants and two funds, both of which are available to one claimant, but only one to the other. The person with the "double" claim can be compelled to resort to the fund not available to the other. See *Cheeseborough v. Millard*, 1 Johns. 418.

325. [Pro. S. 105 & Suc. S. 285] Debts of every description
Debts to be paid before legacies must be paid before any legacy.
legacies.

Section—if Mandatory :—The section lays down a rule of expediency and is not rigidly mandatory, but is more or less simply directory if expediency is not sacrificed. It gives a priority to the debts over the legacies; which may be relaxed if the estate is sufficiently solvent, to meet all its liabilities. There is no sense in unnecessarily deferring the legacies: if they can be paid without any apprehension of risk to the creditors. The whole matter has to be looked at from the stand-point of solvency and expediency or convenience. *Lala Goberdhone Das v. Harish Chandra*, 38 C.W.N. 457 = A.I.R 1934 Cal. 609 = 162 I.C. 198.

Debts —The whole estate of the deceased is liable for debts (see p. 582); therefore, the executor or administrator should first satisfy them before paying any legacy. *Spade v. Smith*, 3 Russ Chanc Cas. 511, and subject to what has been said under the last paragraph, this rule should not be departed from even where the legatees are willing to furnish security before drawing the amount. *Lala Goberdhone Das v. Harish Chandra*, 38 C.W.N. 457 = A.I.R 1934 Cal. 609 = 162 I.C. 198, because even securities may not always prove adequate safeguards, but, on the other hand, may lead to unnecessary complications. *Read also Sardool Singh v. Vir Bhon*, 42 P.L.R. 879, and *Krishnaswami v. Gouramma*, 1436 M.W.N. 367 = A.I.R 1936 Mad 266 = 163 I.C. 195 [Mortgage from the executor cannot have precedence over the creditors]. The description of the debt is

immaterial, as all kinds of debts come under the section. The debts incurred by the Receiver during the management of the estate, can be enforced against it, as the Receiver's acts, being the Court's act, benefited the estate, and the estate cannot avoid the obligations arising out of them. *Mohari Bibi v. Shayama Bibi*, 30 Cal. 937. Debts here include the trade debts, *Sakrabhas v. Maganlal*, 26 Bom. 206. Even voluntary bonds have precedence over the legacies, *Jones v. Powell*, 1 Eq. Cas. Abr., 84, pl. 2; *Hales v. Cox*, 32 Beav. 118. It does not matter that the debts do not constitute any security over the estate. For the obligation of a Hindu widow to pay even the barred debts of her husband, see *Bhagwat v. Bhedule*, 39 Bom., 118. A person taking a legacy, takes it subject to the debts, though he is not precluded from dealing with it by way of mortgaging it. *Ambica v. Mukta*, 2 O.L.J. 188 : 10 C.W.N. 38. The "debt" will include such a debt as is given rise to by a decree against a Mitakshara joint family which is binding on every co-parcener, *Buldeo v. Mobarak Ali*, 29 Cal. 683 : 6 C.W.N. 370. The debts taking precedence over the legacies, a judgment creditor of the deceased is entitled to proceed against the devised properties irrespective of the question that the other assets left by the deceased are sufficient to satisfy the decadal claim, *Abdul Aziz v. Dharam C. Jetha & Co* 42 P.L.R. 427 = A.I.R. 1940 Lah. 848 = 190 I.C. 506. The precedence which the testator's creditors enjoy over his legatees by reason of this section is not in any way affected by the fact that the executor possesses full powers to deal with the estate both for the purpose of paying off the debts and paying the legacies. *Krishna Swami v. Gouriamma*, 1936 M.W.N. 367 = A.I.R. 1936 Mad. 256 = 163 I.C. 196. The creditors rank pari passu and none of them can steal a march over the rest by taking a transfer or mortgage from the executor or claim precedence on that basis, *Ibid.*

Any Legacy.—The expression is wide enough to include all kinds of legacies, whether specific, demonstrative or general. So, if an executor pays the specific legacy on the mistaken belief that the assets are sufficient to pay the debts, he will nevertheless be answerable should the assets subsequently prove insufficient, *Spode v. Smith, supra*.

Difficulty in giving effect to the Section:—Should any difficulty arise—from whatsoever cause—in the matter of giving effect to this section, the executor should bring an administration-suit praying for the construction of the will. Cf. *Karsandas v. Ladkavahu*, 12 Bom. 185; *Byramji v. Rainagar*, 18 Bom. 1.

326. [Pro. S. 106 & Suc. S. 256] If the estate of the deceased Executor or administrator not bound to pay legacies without indemnity. is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Provision for contingent Liabilities:—If there is a possibility for any liability to arise in future in respect of the estate, the executor or administrator will not be bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due, *Simmons v. Bolland*, 3 Mer. 647; *Verdon v. Egmont*, 1 Bligh, N.S. 654; if he pays the legacies without this precaution, he will be liable for such liabilities when they ripen into actual claims, *Taylor v. Taylor*, L.R. 20 Eq 477; *Nector v. Gannett*, Oro. Libz 466; *Ecles v. Lambert*, Style, 87, (54). *Whittaker v. Kershaw*, 45 C.D. 320. When the executor gets notice of a contingent liability it is extremely unsafe for him to distribute the legacies without taking an indemnity under this section, *Ibid.* As against the legatees whom he pays without taking indemnity, he can claim a refund, if the contingent liability has not already ripened into a debt, *Jervis v. Wolferstan*, L.R. 18 Eq 18. If the estate is administered in Court, and the executor acts under its directions, he will be absolutely safe, *Deans v. Allen*, 20 Beav. 1; *England v. Tredegar*, L.R. 1 Eq. 344; *Brewer v. Pocock*, 23 Beav. 310.

327. [Pro. S. 107 & Suc. S. 287] If the assets, after payment Abatement of general debts, necessary expenses and specific legacies, legacies. are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, or to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

N.B.—"Here again the wording of section 107 of the Act of 1881 has been adopted as it states the law more accurately"—*Notes on Clauses of the Original Bill.*

Abatement of General Legacies:—If after the payment of necessary expenses under secs. 320-22 and debts under 323-25, and the specific legacies, the assets prove insufficient to pay the general legacies in full, the latter shall abate proportionately, and *in the absence of any direction to the contrary, in the will*, no general legatee will have priority over another general legatee, *Sharp v. Lush*, 16 Ch. D. 468; see *Williams on Executors*, 11th Ed. p. 1086. As to what are specific and general legacies, *vide* notes at pp. 292-95, *ante*. We have seen under sec. 149, (p. 301) that a specific legacy does not abate with the general legacies for insufficiency of funds, *vide* the cases at p. 301, *ante*. The principle of law is that the general estate is primarily liable for the debts and so long as any part of the general estate remains, the specific legatees cannot be called upon to contribute to the debts. *Baker v. Farmer*, (1868) L.R. 3 Ch. 687. For other cases see *Burridge v. Bradyt*, 1 P. Wms. 127; *Masters v. Masters*, 1 P. Wms. 423.

Annuities:—Rank with general legacies and abate with them, *vide* under sec. 175, at p. 327, *ante*.

Residuary Legatees:—There cannot be any residuum, unless the general legacies are paid in full. So necessarily where the general legacies abate there cannot be any residuary legatee. *Re Lyne's Estate*, L.R. 8 Eq 482. *Vide* also at pp. 204-06. A residuary legatee cannot call upon the general legatees to abate, *Fonnercan v. Payuz*, 1 Bro C.C. 478; *Baker v. Farmer, supra*.

Direction to the contrary:—The rule of abatement as enunciated in this section applies only in the absence of a direction to the contrary in the will. So where the will directs that no deficit should be borne by the legacy to the daughter but should be borne only by the sons, such direction should be given effect to; *Marsh v. Evans*, 1 P.Wms. 668. In the absence of such contrary direction, no general legatee can claim any preference; nay, even on the ground that the legatee is the testator's wife or child, *Blower v. Morret*, 2 Ves. ten 420; nor on the ground of any other special merit; so, the executor can not claim preference for his care and trouble, *Fretwell v. Stacy*, 2 Vern. 434; even the charitable legacies cannot escape such abatement along with the general legacies, *Duncan v. Watts*, 16 Beav. 204; *Attorney-General v. Robins*, 2 P. Wms. 22. It seems that the contrary direction need not be in express words, but may be implied from the language of the will. So, where the will showed an intention not to reduce the legacy to wife and children, on any account, priority was given to such legacy, *Lewin v. Lewin*, 2 Ves. Sen. 415; *Marsh v. Evans, supra*. Cf. *Re Hardy*, 17 Ch. D. 798; *Re Backhouse*, (1916) 1 Ch. 65; *Johnson v. Johnson*, 41 Sim. 313. But such intention should not be gathered from the direction as to the time or order of payment. For instance, the direction that a legacy is to be paid in the first instance or immediately, or that certain legacies are to be paid in a particular order, one after another, will not save any of the legacies from abatement, *Blower v. Morret, supra*, followed in *Re Schwenr's Estate*, (1891) 3 Ch. 44; *Beeston v. Booth*, 4 Maddock, 161; *Brown v. Allen*, 1 Vern. 81; *Nickisson v. Cockell*, 9 Jur. N. S. 975; *Ball v. Bill*, 27 Bom. L.R. 564; A.I.R. 1926 Bom. 337; *Wells v. Barwick*, 17 Ch. D. 798.

Onus:—If a general legatee claims priority and exemption from abatement, the onus is on him to make out a contrary direction. *Miller v. Huddlestorne*, 3 Mac. & G. 513.

Legatee's Suit:—In a suit for legacy against the executor, if he pleads abatement, he must apply for joining the other legatees, *Purshotam v. Kala Govindji*, 26 Bom. 801. The plea of non-joinder is to be taken at the earliest opportunity, *vide*, O.I. r. 19, O.P. Code; also *Ibid.*

328. [Pro. S. 108 & Suc. S. 288] Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

Non-abatement of specific legacy when assets sufficient to pay debts.

Non-abatement of Specific Legacies:—If the general assets are sufficient to meet the necessary expenses (secs 320-22) and to pay the debts, the specific legacies are to be delivered to the legatees *without any abatement*, *Burton v Cooks*, 5 Ves., 464; *Meherwan Jahangir v. Dhunbai Kavasha Misra*, (1940) 1 M.L.J. 918—1940 M.W.N. 569—A.I.R. 1940 Mad. 785; but see *Newbegin v. Bell*, 29 Beav. 386. If, however, the general assets are insufficient to pay the expenses and the debts, the specific legacies suffer a proportionate abatement, *Sleech v. Thorington*, 2 Ves., Sen., 561 (564); also *Clifton v. Burt*, 1 P. Wms 679; *Mullins v. Smith*, 1 Drew & Smith, 204. *Vide Williams on Executors*, 11th Ed. p. 1099, and sec. 380, below. A forgiven debt is a specific legacy, and therefore not liable to abatement with the general legacies, *Re Widmore*, (1907) 2 Ch. 277 (*vide at pp. 295 and 307, ante*). Even if a specific bequest is charged with the payment of debts, (*Ci Amlica v. Mukta*, 2 O.L.J. 138 : 10 C.W.N. 38), it will not suffer any abatement so long as the undisposed residue is sufficient to pay the debts, *Newbegin v. Bell*, *supra*; *Hewett v. Snare*, 1 De G.S. 333; *Corbett v. Corbett*, L.R. 6 Eq 407; *Re M. Morren*, (1917) 1 Ir R. 278 (C.A.). There is however an exception to the rule of non-abatement of specific legacies. If there be several specific legacies on a particular fund and if the fund be insufficient to pay them all, they may abate *inter se*, *Page v. Leapingwell*, 18 Ves. 463. Cf. *Sleech v. Thorington*, *supra*; *Re Tunno*, 45 Ch. D. 66; *Le Jaffrey's Trusts*, L.R. 2 Eq 58; *Miller v. Huddleston*, L.R. 6 Eq. 65. If under the directions contained in the will another legacy has to be paid out of the funds constituting the specific legacy, then that legacy will be charge on the latter, *Meherwan Jahangir v. Dhunbai Kavasha Misra*, *supra*.

Exception

329. [Pro. S. 109 & Suc. S. 289] Where there is a demonstrative legacy and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses.

Priority of Demonstrative Legacy:—If the general assets are sufficient to pay the expenses and the debts, the demonstrative legacy (*vide p. 802*) has a

preferential claim for payment out of the specified fund on which it draws; but it is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. *Mullins v. Smith*, 1 Dr. & Sm. 210 (cited at p. 302); also *Creed v. Creed*, 11 Cl. & Fin. 609. See *Williams on Executors*, 11th Ed. pp. 917 and 1061. For Indian cases illustrating how a demonstrative legacy ranks as a general legacy on failure of the specified fund, see *Jairam v. Kuverbai*, 9 Bom., 491, and 19 I.A. 88-18 Cal. 444 and 29 Mad. 165, cited at p. 303, *ante*. A demonstrative legatee cannot resort to the general assets if there be a contrary direction in the will prohibiting payment to him out of such general assets, *vide Chinnam v. Tadi Kanda*, cited at p. 303, *ante*.

330. [Pro. S. 110 & Suc. S. 290] If the assets are not sufficient to answer the debts and the specific legacies, an Rateable abatement of specific legacies. abatement shall be made from the latter rateably in proportion to their respective amounts.

Illustration.

A has bequeathed to B a diamond ring valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator; and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

When Specific Legacies abate:—When the general assets after deduction of the necessary expenses (secs. 320-322) prove insufficient to answer the debts and the specific legacies, the latter abate rateably *in proportion to their respective amounts*, *vide Williams on Executors*, 11th Ed. p. 916 & 1099 *et seq.*; also *Sleech v. Thurington*, 2 Ves. Ben. 661; *Clifton v. Burt*, 1 P. Wms. 679 (680), cited at p. 646, *supra*. For abatement of specific legacies *inter se*, when drawing on a particular fund, *vide* at p. 646, *ante*. For abatement of annuities *pari passu*, see *Re Twiss: Barclays Bank Ltd. v. Pratt & ors.*, (1941) 1 All. E.R. 93 (Ch. D.).

331. [Pro. S. 111 & Suc. S. 291] For the purpose of abatement, a legacy for life, a sum appropriated by the Legacies treated as general for purpose of will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

The Section:—It lays down that for the purposes of abatement, a legacy for life, the capital amount set apart to produce an annuity (when no fund is set apart for it) are treated as general legacies, that is, they *rateably* abate according to the provisions of sec. 327, *supra*.

Annuity :—As to what is annuity, see at p. 322 ; it may be for life or for years (p. 322) or perpetual (p. 323) ; as to whether it is real or personal *vide* at p. 322 ; also *Lewin v. Lewin*, 2 Ves., 415 ; *Long v. Short*, 1 P. Wms. 408 ; *Trenchard v. Trenchard*, (1905) 1 Ch. 82. Under sec 176, it has priority over a residuary gift, *vide* at p. 328, *ante*. In this respect it differs from the gifts of a life-interest and of a reversion. Neither of the life-tenant or the reversioner has got any priority over the other just as an annuitant has over the residuary legatee under sec. 176, *supra*. In the event of insufficient assets, both the life-tenant and the reversioner proportionately bear the deficit, *vide Williams on Executors*, 11th Ed. 1086.

Value of Annuity :—See *Metcalf v. Blencowe*, (1909) 2 Ch. 424 ; *Re Twiss : Barclays Bank Ltd v. Pratt & ors.*, (1941) 1 All. E.R. 98 (Ch D) ; also the cases at p. 327, under a similar heading.

Jairam's Case : (9 Bom. 491) :—In this case the testator directed certain monthly allowances to be paid to each of his widows out of the income of the G P Notes, which however proved insufficient for the purpose, and the Court held that the testator's other properties were liable to contribute towards the allowances. Cf *Bai Bhikayi v. Bai Denbar*, 13 Bom. L.R. 310.

CHAPTER VIII.

OF ASSENT TO A LEGACY BY EXECUTOR OR ADMINISTRATOR.

332. [Pro. Ss. 112, 148 & Suc. S. 292] The assent of the Assent necessary to executor or administrator is necessary to complete complete legatee's title. a legatee's title to his legacy.

Illustrations.

(i) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(ii) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator.

N. B.— This corresponds to section 292 of the Act of 1865 which is the first section in Part XXXV of that Act which is headed "Of the Executor's Assent

to a Legacy." This at once raises the question of section 148 of the Act of 1881. That section runs as follows: In Chapters VIII, IX, X and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed." These Chapters deal with (1) the executor's assent to a legacy, (2) the payment and apportionment of annuities, (3) the investment of funds to provide for legacies and (4) the refunding of legacies. They correspond to Parts XXXV, XXXVI, XXXVII and XXXVIII of the Act of 1865 but that Act contains no specific provisions of the kind contained in section 148. To take the first question, the executor's assent to a legacy, it would seem that the executor and the administrator with the will annexed are in exactly the same position. The reason why the assent of the executor is necessary is that the estate of the deceased is vested in the executor and the legatee's title to the legacies is only incognit. Equally this is true of the administrator with the will annexed. It would seem therefore that under the Indian Succession Act the assent of an administrator with the will annexed to a legacy is probably necessary though no specific provision exists. It is well settled law in England that this is so, see *Doe v. Mobberley*, 6 C and P 126; *Broker v. Charter*, Cro. Eliz. 92. Similarly, the other provisions specifically mentioned in section 148 appear to be applicable to cases under the Indian Succession Act. The Bill has been drafted to give effect to this view by specific amendments"—*Notes on Clause of the Original Bill*.

Language of the Section:—The section has been unhappily worded; the logical consequence of it would be that a legatee, whose title is not completed by the assent of the executor, cannot maintain a suit against the latter for his legacy and that he would always be at the mercy of a capricious executor. So the Courts have refused to accept a strict interpretation of it, in order to avoid this logical absurdity, and held that the legatee is entitled to maintain an administration suit even before the necessary assent. *Hasonally v. Popatil*, 37 Bom., 211: 14 Bom L.R. 782: 17 I.C. 17; vide also *Khagendra v. Kheira*, 36 C.L.J. 21 at p. 26. The Madras High Court has further simplified the legatee's position by conceding a right of suit for his legacy against a reluctant executor without such assent at all, *Parthasarathy v. Venkatadri*, 46 Mrd 190 (224): 48 M.L.J. 486: A.I.R. 1922 Mad 457. The Nagpur Court also has held that if the executor withholds his consent arbitrarily, it will be competent for the legatee to bring a suit for recovery of the property bequeathed to him by joining the executor with his transferees (if any), *Vithal v. Narayan*, A.I.R. 1931 Nag 69-134 I.C. 259.

Assent:—As (under sec. 211) all the property of the deceased vests in the executor or the administrator, he is primarily liable for all the debts and the legacies of the testator; and in order that such executor or administrator may not be hampered in his work of administering the estate, this section prohibits the appropriation of any part of the estate by any of the legatees without his sanction. Vide Williams *On Executors*, 11th Ed. p. 1100. If the legatee takes

possession of the bequeathed property without the executor's assent, the executor will be entitled to maintain an action of trespass or trover against him, *Mead v. Ormery*, 3 Atk 299. As a protection to the executor the law ordains that every legatee, whether general or specific and whether of chattels, real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect, before such assent however the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives in case of his death before it be paid or delivered, and in the case of the outlawry of the legatee it is subject to forfeiture, *Khagendra v. Kshetra*, 60 Cal. 171 : 36 C.L.J. 21. A.I.R. 1929 Cal. 21,—followed in *Papurbai v. Chutermal*, A.I.R. 1929 Sind. 19—114 I.C. 105. So it necessarily follows that the legatee has a transferable interest in, and can mortgage away, his interest even before assent, *Ibid.*, see also *Ambaa v. Mukta*, 2 C.L.J. 1:8 10 O.W.N. 68, *Drake v. Page* (1891) 127 N.Y. 561 (F.B.), *Davis v. Wilson* (1902) 115 Ky. 659, *O'erton v. Means*, 2 Ky. L.R. 211, *Indu Prava Dabi v. Durga Charan Mitra*, 18 Pat. 528—A.I.R. 1940 Pat. 40—185 I.C. 565. The assent simply perfects the legatee's title which he acquires under the will. It does not create any title, *Christ v. Christ*, (1849) 1 Ind. 570, 50 Am. Dec. 481, referred to in *Khagendra v. Kshetra*, *supra*.

Effect of Assent

It vests the legal title to the property in the devisee without the necessity of any conveyance, Cooch v. Culverhouse, (1856) 2 Ch. 251 and thereafter he can maintain a suit in respect of his legacy, *Fanna Devi v. Sham Lal*, A.I.R. 1933 Lah. 805—146 I.C. 633, cited at p. 403, ante. Vide also the notes under the next section under the heading 'Effect of Assent.'

For form of assent, vide under sec. 333. If the executor Executor cannot withhold assent. refuses to give his assent arbitrarily and without proper justification, the court may compel him to give it, *Martin v. Wilson*, (1913) 1 H. R. 470, or grant a decree in favour of the legatee in respect of his legacy, *Vithal v. Narayan*, A.I.R. 1931 Nag. 69—194 I.C. 269. Vide also the cases under the heading 'Language of the section,' *supra*.

An assent does not defeat the rights of creditors, who can follow the general assets unaffected by the assent, *Re Halley*, 13 Ch. D. 696, but see *Blake v. Gale* 32 Ch. D. 671. There may be an assent as to part only of a legacy, *Elliot v. Elliot* 9 M.W. 28,

Assent as to part or a residuary gift, *Austin v. Beddoes*, 41 W.R. (Eng.), 619.

Objection on the ground of want of assent — Objection on the ground of absence of assent cannot be raised for the first time in revision, *Bai Dahi v. Ghana Shyam*, A.I.R. 1966 Bom. 102

Void Legacy — If the legacy is void, the assent is of no avail, *Christ v. Christ*, *supra*, *Khagendra v. Kshetra*, *supra*

Time for assent :— An assent should not ordinarily be given until the executor has ascertained that the assets after deduction of the testamentary

expenses, are sufficient to pay the debts.⁴ If he does so he runs a great risk. Compare the notes under sec. 326, *supra*. Sec. 397 has given the executor a discretion to withhold payment or delivery of a legacy for one year after the death of the testator. Cf. *Rajamanner v. Suba Lakshmi*, 2 M.L.J. 182. But he cannot withhold assent without proper justification, *cids supra*.

Who can Assent:—This section contemplates only testacy as the question of legacy can arise only with reference to a will. Under this section, only (1) an executor or administrator can assent. (2) The section does not require that the executor should obtain a probate before assent. So he can assent before obtaining probate, and ordinarily as early as possibly after payment of the testamentary expenses and debts, *Greens v. Greens*, 3 Ir Eq 102. (3) For the inclusion of administrator in the section, *vide Notes on Clauses quoted above*; the administrator must necessarily obtain letters *cum testamento annexo* (with the will annexed) as the section contemplates only testacy. (4) One of several executors can assent, *vide Illus (iv) of sec. 311, supra*. If such executor be also a legatee he can assent to his own legacy, see *Coles v. Niles*, 10 Hals. 179. (5) An administrator *durantis minoritatis* (p. 458, *ante*) can assent hereunder.

Legacy for life:—For the position of a devisee of immoveable property for life, see *Chiman Rao v. Ramhar*, 4 Bom. L.R. 508; *Re Fortune*, Ir R 4 Eq 361.

Assent—a question of fact:—The question of assent, though at times it may involve matters of law, is ordinarily a question of fact, *Thorne v. Thorne*, (1893) 3 Ch. 196; *Mason v. Farnell*, 12 M & W. 674. *Vide* under the heading, "Presumption of Assent," under sec. 3.3, *infra*. Whether the executor has assented to the legacy must be decided on the facts and circumstances of each case, *Indu Prova Deb v. Durga Charan Mitra*, 18 Pat. 828—A I.R. 1940 Pat. 40—186 I.O. 665.

Assent irrevocable:—An assent once given is *irrevocable*, unless a deficiency of assets, unknown at the time of assent, is subsequently discovered. *Orr v. Kainess*, 2 Ves 194; *Coppin v. Coppin*, 2 P. Wms. 296. So it is not open to the executor to retract it, unless given under mistake, dureas Retraction of assent. and fraud and so forth, *vide Williams*, 1885; *Walker and Elg.* 189. So once the assent is given and a fund set apart for payment of the legacy, the executor cannot any more retain or impound the fund for realisation of a debt due to the estate from the legatee, *Ballard v. Marsden*, L.R. 14 Ch. 1, 374. Cf. *Mead v. Orrery*, 9 Atk. 298.

Suit for Legacy:—In such a suit the plaintiff is not bound to pray for an administration, *Purshottam v. Kala Govindji*, 26 Bom., 301. Cf. *Rajamanner v. Venkata Krishnayya*, 25 Mad. 361; *Satyabhama Bai v. Murlidhar*, I.L.B. (1944)

Nag. 817 - 1944 N.L.J. 458 - A.I.R. 1944 Nag. 877. The prayer for administration does not render it governable by Art. 120, instead of Art. 128 of the Limitation Act, *Ibid.* For Limitation, see below. The Plaintiff in such a suit must show that (1) there are sufficient assets, (2) the executor has given assent, *Okhoy v. Koyalash*, 17 Cal. 387 (389); *Comp. Panna Devi v. Sham Lal*, A.I.R. 1933 Lah. 805 - 146 I.C. 698. If, in such a suit, abatement is pleaded in defence, all the legatees should be placed on the record, 26 Bom. 301, *supra*. If there is no assent, the suit for legacy should pray for administration of the whole estate, *Salebai v. Bai Safiaba*, 86 Bom. 111. See also *Hassonally v. Popatlal*, 87 Bom. 211 (cited at p. 649, *ante*). But if the absence of assent is due to the death of the executor before accepting office, the legatee will not be precluded from bringing a suit to recover the legacy without the assent, *Parthaarathy v. Venkatadri*, 46 Mad. 190 (228) : 48 M.L.J. 483 : A.I.R. 1922 Mad. 467.

Limitation for Suit for Legacy :—Is provided for by Art. 128 of the Limitation Act of 1908, *vide* the following cases, *Cursejje v. Dudabhai*, 19 Mad. 426; *Salebai v. Bai Safiaba*, 86 Bom. 111; *Issur Chandra v. Juggut Chandra*, 9 Cal. 79; *Waddell v. Harshaw*, (1905) 1 I.R. 416. No question of limitation arises where the person to pay and the person to receive are the same, *Narandas v. Narandas*, 81 Bom., 618. Cf. *Yakub v. Bai Rahimbar*, 10 Bom. L.B. 346. A suit for legacy is nonetheless a suit for legacy notwithstanding the fact that a prayer for administration has been made as an ancillary relief, *Rajamanner v. Venkatakrishnayya*, 25 Mad. 951. As to the meaning of the words "payable" and "deliverable" in Art. 128 of the Limitation Act, see *Venkatadri v. Muhibboob*, 29 C.W.N. 989, P.C. The old Art. 128 has now been replaced by Art. 106 of the Act of 1968 (Act xxxvi).

N. B —Compare the following Articles of the old Limitation Act—91, 120, 128, 140 and 141. For limitation of Administration suit—see 20 Cal., 906; 25 Mad. 361.

Limitation for suit by devisee for possession of immovable property :—*Vide* Art 140 of the Limitation Act; and *Kristo Kinkur v. Panchuram*, 17 Cal. 272. **N. B** The old Art 140 is now Art. 65 of the Act of 1968.

Bequest in favour of a Trust :—No prior suit for administration is necessary to sustain a scheme suit under sec. 92 of the C. P. Code, in respect of the Trust; read I.L.R. (1958) Mad. 1154—(1958) 2 M.L.J. 367—A.I.R. 1958 Mad. 906

333. [Pro. S. 113 & Suc. S. 293] (1) The assent of the

Effect of Executor's assent to specific legacy.

executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject

of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

[P. & A.S. 148] (2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

Illustrations.

(i) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest. [See *Paramour v. Yardley*, Plowd. 599].

(iii) A bequest is made of a fund to A and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

(iv) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(v) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed. [See *Cole v. Miles*, 10 Hare, 179].

Sub-sec. (1): Effect of Assent:—Upon assenting to a specific legacy, the executor is divested of his interest therein, and he becomes a trustee for the legatee. *Dix v. Burford*, 19 Beav. 402. The legal estate is then transferred to, and vested in, the legatee, *Cook v. Culverhouse*, (1896) 2 Ch 261 and then the legatee can sue even the executor for ejectment. *Doe v. Guy*, 8 East. 120; *Williams v. Lee*, 3 Atk. 224, because then his title is complete, *Saratchandia v. Pramatha Nath*, 37 C.W.N. 113—A.I.R. 1933 Cal. 482—146 I.C. 295. The assent alone is sufficient to effect a transfer of the interest to the legatee and for that purpose no actual conveyance is necessary, read the notes under the next heading. The executor is not as of right entitled to any release from his beneficiary. *Mariam Bibi v. Cassim Ebrahim*, 1940 Rang. L.R. 35—A.I.R. 1959 Rang 278. Notice that this section contemplates the assent to operate like a transfer. Sec. 337 speaks of "deliver" which is the necessary second step for the executor to follow in order to complete the transfer. The word *transfer* here however should not be understood in that wide sense, in which the term is understood in the T.P. Act. Here

it simply means the divesting of the executor of the legal estate and vesting the same in the beneficiary or the passing of the property from the executor to the devisee; it is not such a transfer as can possibly amount to a breach of the covenant not to assign contained in a contract of lease, *Jayawardene v. Jayawardene*, A.I.B. 1939 P.C. 188 = 182 I.O. 770 (P.C.). The beneficiary has a right of his own even apart from the formality involved in the assent. So, the Lahore Court has come to hold that the legatee can, with the permission of the executor, maintain a suit on the basis of a pronote to which he has become entitled under the provisions of the will, *Panna Devi v. Sham Lal*, A.I.R. 1933 Lah. 805 = 146 I.C. 683. In the case of a legacy to a deity the property vests in the deity as soon as the executor gives his assent, and if the executor thereafter acts under the will he does so as a person having the secular management of the deity, *Shridhar Jiu v. Sushi Mukhi Das*, I L.R. (1942) 1 Cal 365. When the executor assents to a legacy and sets apart a fund to meet it, the legacy and the funds are trust properties in his hands, *Timbuk v. Narayan*, 33 Bom., 429. But this does not mean that he can then make a reference for guidance under sec 34 of the Trusts Act (II of 1882), *Ibid*. In fact, after giving assent, the executor is not any more competent to deal with the bequeathed property, *Marie Penhero v. Jaiendra Mohan*, 28 C.L.J. 141. Cf. *Attenborough v. Solomon*, (1913) A.C. 76. To effect a transfer by means of an assent, no conveyance is necessary, *vide* the notes under sub-sec (2), below.

Sub-sec. (2); Form of Assent:—There is no particular form for signifying assent; it may be verbal and may be either *express* or *implied* from the conduct of the executor or administrator. See Williams *On Executors*, p. 1108. Also *Thorne v. Thorne*, (1893) 3 Ch. 196, and *Sarat Chandra v. Pramatha Nath*, *supra*. So, where the executor applies the rents and profits of the bequeathed property for the maintenance of the legatee during his minority, such act will *imply* an assent, *Paramour v. Yardley*, Plowd 639; also illustration (ii) above. Similarly, an assent will be *implied* from the fact that the executor has debited the legatee with the amount that the executor has paid as rent for the devised property, *Doe v. Mabberley*, 6 C. & P. 196. An intimation to the legatee that the bequeathed property is ready for delivery will likewise, be an assent by implication, *Barnard v. Pumpfrett*, 5 M & Or. 70; *Hawkes v. Saunders*, Cowp 293. There is no necessity for a conveyance to signify assent, *Cook v. Cullerhouse*, (1896) 2 Ch. 261, though there is nothing in the law to preclude the granting of such a conveyance. The legatee cannot insist on conveyance where a *written* assent has been given, *Plimley v. Stileman*, 1901 W.N. 165. For safety it is always desirable to have an assent in writing, *Ibid*.

Presumption of Assent:—In absence of a clear proof of assent it may be presumed from circumstances, *vide* illustrations (iv) and (v), *supra*; also see the cases relating to *implied* assent in the previous paragraph. Under sec. 114

of the Indian Evidence Act, there will be a natural presumption that the executor has acted in conformity with his duty and, as a part of his duty, has given the necessary consent. Cf. *Gray v. Wallis*, 2 P. Wms 681 (582). There will arise a presumption in favour of an assent, if the executor dies after payment of the debts and before distribution of the legacies. *Ibid.* Where the executor was also a specific legatee and after having fully administered the estate, he died, he may be presumed to have assented to his legacy, *Saratchandra v. Pramatha Nath*, 97 C W N. 113 = A.I.R. 1933 Cal. 482 = 115 I C 295. Where the outgoings of the testator and the specific legacies have been paid, and the executor who is also a residuary legatee under the will mortgages the property devised to him in his personal capacity, an inference of assent by the executor in his own favour *qua* residuary legatee will arise, *Indu Prava Deka v. Durga Charan Mitra*, 18 Pat 828 = A I R 1940 Pat 40 = 185 I C 865.

Effect of assent where probate revoked :—Subsequent revocation of probate does not affect the position of a legatee whose title is completed by assent and payment or possession, *Re West*, (1909) 2 Ch 180. Compare the cases cited under the heading "Sales under void grants," at p. 677, ante.

334. [Pro. Ss. 114, 148 & Suc. S. 294] **The assent of an executor or administrator to a legacy may be conditional, Conditional assent.** and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

Illustrations.

(i) A bequeaths to B. his lands of Sultanpur, which at the date of the will, and at the death of A., were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(ii) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

Conditional Assent :—If the executor has the right to attach a condition to the assent, the assent does not take effect until the condition is fulfilled. *Vide Illus. (i); see also Williams On Executors*, pp. 1105-06; *Elliot v. Elliot*, 9 M. & W. 28. The condition should be one which the executor has the right to impose, otherwise the assent will be absolute as in illus. (ii) where the assent is valid, but the condition is void.

Effect of assent to the executor's own legacy :—Dealing with the estate thereafter will be *qua* legatee and not *qua* an executor. Read the cases cited under

the last heading. If there is a specific bequest to the executor himself on trust, and he assents to it, the executor becomes a trustee for those who are beneficially interested. He is thereupon precluded from dealing with the property bequeathed except as a trustee or from making out a title in his capacity as an executor, *Charu Chandra Ghose v. Bankin Ch. Sett.*, 42 C.W.N. 1116.

335. [Pro. Ss. 115, 148 & Suc. S. 295] (1) When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may, in like manner, be expressed or implied.

(2) Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

Legacy to Executor:—Under sec. 141, *supra*, if a legacy is bequeathed to an executor, he cannot take the legacy unless he proves the will or otherwise shows his intention to act as executor, *Iraavan v. Administrator-General*, 15 Cal. 83. The union of the two characters, of executor and legatee, in one person does not do away with the necessity of assent as a condition precedent to the completion of the legatee's title (as laid down in sec 332). See Williams, 1108; Wentworth, 67-68. An executor need not shed his character in order to appear as a legatee, *Bagoo Jan v. Zhoorul Hug*, 13 W.R. 69. The doctrine of assent derives its importance from the fact that it involves and implies the ascertainment of assets available for distribution among the legatees after payment of the debts: That is why an assent is as much necessary for the executor-legatee as for any other legatee. The rule of assent is absolute and admits of no exception or deviation, 15 Cal. 83, *supra*. Where one of several executors is a legatee, his own assent will perfect his title, *Townson v. Tickell*, 3 B. & A. 31 (40); also Walker and Elg. 136. Where the legacy is to the executor in trust for another person, assent to such legacy operates to complete the executor's title as trustee, and to sever the bequeathed property from the testator's estate, *Dia v. Burford*, 19 Beav. 412. Cf. *Re Smith*, 42 Ch. D. 302; *Re Verratt's Contract*, (1905) 1 Ch. 65. Where an executor renounces probate, his own assent to his legacy is ineffectual; and then the assent of the executor or administrator in office will be necessary for him, just like for any other legatee, *Broker v. Charter*, Cro. Eliz., 92 (*vide Notes on*

Clauses at p. 649, supra), but the self-assent of the executor to his own legacy will not be invalidated by the fact that no probate has as yet been obtained, *Indu Prova Debi v. Durga Charan Mitra*, 18 Pat. 828—A.I.R. 1940 Pat 40—186 I.C. 865. If the executor accepts office, the estate vests in him from the date of the testator's death and he becomes clothed with the powers of an executor irrespective of the question whether the will remains to be probated; that is why the law regards an assent even before probate as valid.

Sub-sec. (2):—Under this sub-section executor's assent to his own legacy may be inferred from his acts which befit his character of legatee rather than of executor, *vide Doe v. Sturges*, 7 Teant. 223. For example, when the executor, happening also to be a residuary legatee under the will mortgages the property *qua* such legatee, an assent in his own favour will be inferred, *Indu Prova Debi v. Durga Ch. Mitra*, 18 Pat 828—A.I.R. 1940 Pat 40—186 I.C. 865.

336. [Pro. Ss. 116, 148 & Suc. S. 296] The assent of the executor or administrator to a legacy gives effect
Effect of executor's assent. to it from the death of the testator.

Illustrations.

(i) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy.

(ii) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to his legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

Assent relates back to time of Death:—The assent of the executor relates back to the time of the testator's death, or in other words, the assent gives effect to the legacy from the death of the testator, Wentworth, 446-56. So that the rents and profits of the bequeathed property accruing since the testator's death but before the assent will belong to the legatee when the assent is obtained, *vide* Illus. (ii); also *Saunders case*, 5 Co. 126; *Rex v. Commissioners of Income-Tax*, (1920) 1 K.B. 468; and, if the legatee should intermeddle with the legacy or effect any alienation in respect of it [*vide* Illus (i)], the assent will have the effect of confirming or validating the same, *Khagendra v. Khetra*, 60 Cal. 171: 86 C.L.J. 21 A.I.R. 1928 Cal. 21. See *Williams. On Executors*, 11th Ed., p 1106. Read also the quotations at pp. 24 and 25 of 86 C.L.J. 21, which will greatly help the elucidation of the law relating to assent to legacies.

337. [Pro. Ss. 117, 148 & Suc. S. 297] An executor or administrator when to minister is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year. (*See Brooks v. Lewis*, 6 Madd 358).

Time for payment or delivery of Legacies:—The section enables the executor or the administrator to withhold payment or delivery of the legacy for one year from the testator's death. This is a mere rule of convenience adopted by the Courts to give an executor or administrator sufficient time to ascertain the real financial position of the estate in relation to the debts and the legacies thereof; *Wood v. Penoyre*, 18 Ves 383, *McLeod v. Sorabji*, 7 Bom L.R. 765. It does not however in any way prevent the vesting of the legacy *Garthshore v. Chalke* 10 Ves 13 (cited at p 207, ante). So if in the meantime, the legatee dies, his heirs take his interest, *vide* notes under sec 104 *supra*. The rule of this section applies even when the testator has directed payment within a year, *Brooks v. Lewis*, 6 Madd. 358, *Benson v. Maude*, 6 Madd 16. Though the executor can not be compelled to pay within a year, *McLeod v. Sorabji*, 7 Bom. L.R. 765, *supra*; still there is nothing to prevent him from paying earlier if he so chooses *see Garthshore v. Chalke supra*; *Pearson v. Pearson* 1 Soh & Laf 12, *Angerstein v. Martin*, 1 Turn & R 241. Again, there is nothing to prevent the legatee from suing for administration before one year, *Prosser v. Mossop*, 29 W.R. 439. There is a natural presumption that the testator has utilised the period of one year for the purpose for which the time is given to him. That is, he has done the preliminaries to the payment of debts and the distribution of the legacies *Wood v. Penoyre, supra*. Though the testator cannot shorten this period of one year by his directions, (*vide Brooks v. Lewis, supra*), still it is competent for him to give a direction that the will shall have no effect for at least two years from the arrival of his death news. Such a direction does not invalidate the will but simply puts off the payment giving the executor two years' time instead of the statutory period of one year. *Administrator-General v. Hukles*, 40 Cal 192 ('06). The effect of this section read with sec 366, *infra*, is that after the expiry of one year, the moment the legacies are paid, the residuary legatees becomes entitled to the residue, *McLeod v. Sorabji, supra*; Cf *Ganod Sundas v. Nalini R. Rala*, 12 C.W.N. 1065 (1070), and the cases cited there. The other effect of the section is that the pecuniary legacies bear interest only from the expiration of the year, *Pearson v. Pearson supra*.

Executor's Year:—The executor is the absolute master of this period, *see Garthshore's case, supra*: also other cases cited above. His mastery is however

only with respect to the payment of the legacies and not of the debts. So the creditors can sue him at any time within this period, *Nicholas v. Judson*, 2 Atk. 301. No one but himself, nor even the testator can curtail it, *vide supra*. The testator can however prolong the period, 40 Cal. 192 (*supra*). For the effect of the section, *vide* under the last heading.

Administration Suit:—is not barred before the expiry of the Executor's year, 29 W.R. 489 (*supra*). Though, such a suit is not barred, still the Court ought to wait until all the claims against the estate are ascertained before directing payment of the legacies, *Digby v. Boycott*, 4 Hs., 444.

Time for Conversion:—Where conversion is necessary in view of the provisions of sec. 148, *supra*, it should, ordinarily, take place by the end of the executor's year, and in default, good reasons have to be shown, *Grayburn v. Clarkson*, 3 Ch. 606. But if the testator has given an absolute discretion to the executor with respect to the question of conversion, the executor will not be bound by the ordinary rule to convert within a year, *Brindley v. Partridge*, 13 C.D. 654.

CHAPTER IX.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

338. [Pro. S. 118 & Suc. S. 298] Where an annuity is given by a will, and no time is fixed for its commencement when no time is mentioned, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

Commencement of Annuity:—The will speaks from the time of the testator's death, *Hughton v. Franklin*, 1 Sim. & Stu 390; *Brijraj v. Sheodan*, 88 All. 387; 17 C.W.N. 449; 18 O.L.J. 57 (P.C.); so an annuity is presumed to commence at such death, unless there are expressions in the will or circumstances to contradict the presumption. See *Williams*, 11th Ed. p. 624 *et seq.* Of course, the first payment may be made at the expiration of the executor's year, see *Gibson v. Scott*, 7 Ves. 96; *Fearns v. Young*, 9 Ves. 553, and the notes at p. 326, *ante*; see also *Stamper v. Pickering*, 9 Sim., 196; *Re Robbins*, (1907) 2 Ch. 8 (18). For further informations on the subject, *vide* notes under secs. 175-176, *supra*.

What is annuity:—*Vide* at p. 322, *ante*.

339. [Pro. Ss. 119, 148 & Suc. S. 299] Where there is a direction that the annuity shall be paid quarterly or paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death ; and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year...

Monthly and Quarterly payment:—When the annuity is directed to be paid quarterly, (*Storer v. Prestage*; 9 Madd. 167) or monthly (*Houghton v. Franklin* 1 Sim. & Stu., 390), the first payment becomes due at the end of the first quarter or the first month as the case may be; though the *actual payment* may be deferred at the executor's discretion till the termination of his year, *vide* notes at p. 326, *ante*; see also *Williams on Executors*, pp. 1118 *et seq.*

340. [Pro. S. 120 & Suc. S. 300] (1) Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorises the first payment to be made.

(2) If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

Successive payments of Annuity:—When the direction in the will is that the first payment of an annuity is to be made within one month or one quarter, from the testator's death or a certain day, the successive payments are to be made on the anniversary of the earliest day of payment. English Law.

The English law on this point is somewhat different. There the second year's payment is made not on the anniversary of the "earliest day" of payment but at the end of the second year. Thus, it has been held in *Jervin v. Ironmonger*; 2 Russ. & Myl. 631 that "where a testator gives an annuity to A for life, and directs the first payment to be made within one month from his death, the annuity commences from the death of the testator, and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of that year."

Direction:—This section applies only if there is a direction in respect of the first payment. Such direction may be in express words, or may be implied from the language of the will. Thus, where an annuity was directed to be purchased on

'prescribed day, there was 'an implied gift from that day,' *Re Robbins*, (1907) 9 Ch. 6, cited above and at p. 325, *ante.* : "

Sub-sec (2): Apportionment:—If the annuitant dies in the interval between the two dates of payment, the annuity he earned for the fractional period will be apportioned and paid on his death to his representatives. Such apportionment is possible on the theory that the money accrues due from day to day. Cf. the English statute, 33 and 34 Vict C. 46, under which the annuities accrue due from day to day.

Executor's duty in making apportionment when himself a beneficiary along with other infant beneficiaries:—Where one of the executors of the will is also a beneficiary under the will along with other beneficiaries who are infants, it is essential that in making apportionment such executor should proceed with exceptional care and no making any allocations to himself as beneficiary and to the other infant beneficiaries. It is of great importance for him to have the proposed allocations on each side carefully considered both by the other co-executors and the guardians of the infant beneficiaries. *Mary Elizabeth Ward v. Gerald Allen Wood*, A.I.R. 1939 P.C. 33-180 I.C. 612 (P.C.)

CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

341. [Pto. S. 121 & Suc. S. 301] "Where a legacy, not being a specific legacy, is given for life, the sum bequeathed where legatee not specific, given for life, shall at the end of the year be invested in such securities as the High Court may by any general rule authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due."

Investment of amount of Legacy for life:—This section seems to contemplate (1) a *pecuniary* legacy, as is evident from the words, "sum," "invested" (not converted) and invested as in sec. 148, *supra*) as well from the title of the Chapter and (2) a legacy other than a specific legacy (Cf. sec 147, *supra*) and provides that the sum bequeathed shall be, at the end of the executor's year, invested in proper securities according to the rules made by the High Court in that behalf, and the proceeds or interests thereof be paid to the life-tenant as they fall due. For the English law as to bequests for life with remainder over see *Harris v. Dartmouth*, cited at p 300, *ante*. The Indian High Courts (as pointed out in *De Souza v. De Souza*, 12 Bom. H.C.R. 184, 196) do not appear to have framed any rules of

Investment under this section. *Vide* notes under the heading "Rules of Investment" at p. 300, ante. For liability for keeping money in unauthorised securities, see *Dhupati v. Andoor*, 38 I.C. 604 (Mad.).

342. [Pro. S. 122 & Suc. S. 302] (1) Where a general legacy

Investment of general legacy, to be paid at future time: Disposal of intermediate interest. is given to be paid at a future time, the executor or administrator shall invest a sum sufficient to meet it in securities of the kind mentioned in section 341.

(2) The intermediate interest shall form part of the residue of the testator's estate.

Investment when Legacy payable in future:—Where a legacy is presently vested but payable in future [*vide Re Hall*, (1809) 2 Ch. 226,] the legatee is not entitled to receive it before the date of payment but he is entitled to come to Court and ask for his legacy to be set apart. *Phipps v. Annesley*, 2 Atk 68; *Lloyd v. Williams*, 2 Atk. 108; also *Johnson v. Mills*; *Fernand v. Prem*, and other cases cited in *Williams*, 11th Ed p 1129, *et seq.* Like the preceding section, this section also contemplates only pecuniary legacies, the words "paid," "invest," "sum" coupled with the Chapter title point to that.

Sub-sec. (2): Intermediate Interest:—The general rule being that the legatee is entitled to interest only from the time when the legacy becomes payable (*Heath v. Perry*, 3 Atk. 101, 102; *Coventry v. Higgins*, 14 Sm. 30), it necessarily follows that such *intermediate* interest is not claimable by the legatee, but will form part of the residue of the testator's estate. *Vide* sec. 352, *infra*. In England the principle of this sub-section has not been applied to cases in which the legacy has already been severed from the testator's estate, *vide Re Dickson*, 29 Ch. D. 881 (1886); *Re Jenkin's Trust*, 25 Ch D 743; *Re Couturier*, (1907) 1 Ch 470; *Re Imman*, (1898) 8 Ch. 618.

343. [Pro S. 123 & Suc. S. 303] Where an annuity is given

Procedure when no fund is charged with its payment or fund charged with, or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341.

Investment when annuity is charged on no Fund:—When an annuity is given but no fund is appropriated for its payment, then, two courses may be followed; either (1) a Government annuity of the specified amount shall be pur-

chased, or (2) a sufficient sum should be invested in the securities referred to in sec. 341 so as to yield the annuity. In England, they prefer consols to any other Government security, *Holtin v. Holtin*, 67 L.J. Ch. 926; *Bewe v. Dartmouth*, 7 Ves., 150. Compare this section with sec. 174 which provides for (a) the cases where annuity is charged on property and (b) the cases where money is bequeathed for the purchase of an annuity, and see *Dawson v. Hearn*, 1 R. & M. 606; *Re Ross*, (1901) 1 Ch. 162; *Re Brunning* (1909) 1 Ch. 276. In the case contemplated by sec. 174, the annuitant can, in his option, take the entire sum in cash or the annual sum, *vide Re Bobbin's* and the other cases cited p. 326, *ante*. But under this section that is not possible.

"Sufficient sum to produce the annuity":—The sum appropriated may be sufficient to answer the annuity at the time of investment, but may afterwards prove insufficient by reason of the reduction of the rate of interest. In such a case the annuitant may call for further investment to make up the deficit. *May v. Burnett*, 1 Russ. Ch. (as 370); *Davies v. Waller*, 1 Sim. & Stu. 463. But this principle will not apply where the testator directed the money to be invested in a particular stock, and if the interest of such stock is reduced, the annuitant is to bear it, because, then the case virtually falls within the scope of sec. 74. See *Kindell v. Russell*, 3 Sim. 124. *Vide also Williams On Executors*, 11th Ed. pp. 947, 1129, *et seq.*

344. [Pro. S. 124 & Suc. S. 304] Where a bequest is contingent, the executor or administrator is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if it shall become due.

No investment of Contingent Legacy:—Where the legacy of a certain sum of money is given on a contingency, the amount is not capable of appropriation until the contingency happens; therefore, the amount will not be invested but will be made over to the residuary legatee (*vide* secs. 102 and 103), if any, on his giving sufficient security for the payment of the legacy, if it at all becomes due. *Webber v. Webber*, 1 Sim. & Stu. 311 (per Leach V.C.). The contingent legacy may not at all become due, (*vide* notes under secs. 119-20, 124-26). So it is undesirable to tie up the money in investment. Cf. *Re Hall* (1903) 2 Ch. 226; *Green v. Pigot*, 1 Bro. C.C. 103. If the contingency happens, and the legacy at all becomes payable, the interest of the legatee will be protected by the security to be taken under this section. Cf. *Thomas & Montgomery*, 1 Rus. & My., 729. See *Williams On Executors*, 11th Ed. p. 1129, *et seq.*

Legacy subject to divesting Contingency:—The section does not provide for the case where the legatee is divested of his interest on the happening of a

contingency and there is a gift over to another person. But it seems that in such a case the legatee can, immediately on the expiration of the executor's year, take the money on his giving security for repayment in the event of his being subsequently divested. But no security will be necessary if the divesting condition be not valid in law, *vide* at p. 280. *Vide* also the notes under sec. 184, *supra*; also *Fawkes v. Grey*, 18 Ves. 180.

345. [Suc. S. 305] (1) Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in securities of the kind mentioned in section 341 shall be converted into money and invested in such securities.

Investment of residue bequeathed for life without direction to invest in particular securities.

(2) *This section shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.*

N B—"This reproduces sec. 305 of the Act of 1865, but as the provision does not occur in the Act of 1881: the proviso inserted is necessary"—*Notes on Clauses of the Original Bill.*

Investment when residue bequeathed for life:—When the residue is bequeathed for life and the testator himself has not directed its investment in any particular securities, then it will be converted into money and invested in the securities of the kind mentioned in sec 341. *Vide Howe v Dartmouth*, cited at p. 300, *ante*. This rule is for the benefit of both the life-tenant and the remainder-man as it preserves the property by preventing waste (*i.e. Pickering v Fichering*, 2 My & Cr. 289; *Re Bates*, (1907) 1 Ch 22 (26); *Macdonald v. Irvine*, 8 Ch. D. 121; *Re Strandbezies*, (1901) 2 Ch 782; *Re Oliver*, (1908) 2 Ch. 74. For the rule of conversion in the case of specific legacy to several persons in succession, *vide* sec. 148, *supra*, and the cases thereunder. *Vide* also the notes under sec. 347, *infra*.

Conversion:—In converting property under this section or under sec. 148, the English decisions can be followed only subject to limitations. In India, (1) the rule is always subject to the direction of the testator to the contrary, *vide* at p. 300, *ante* and (2) the Executor has greater discretion in the matter; so he is not liable for loss to the estate resulting from non-conversion, *see De Souza v. De Souza*, 12 Bom. H.C.R. 184. *Vide* notes under sec. 349, *infra*.

Sub sec. (2):—*Vide the Notes on Clauses, above.*

346. [Pro. S. 125 & Suc. S. 306] Where the testator has

Investment of residue
bequeathed for life,
with direction to invest
in specified securities.
for life with a direction that it shall be invested
in certain specified securities, so much of the
estate as is not at the time of his death invested
in securities, of the specified kind shall be converted into money
and invested in such securities.

Section compared with the last one :—This section differs from the last one in the fact that under this section there is a direction by the testator for investment of the residue in certain specified securities (*vide Wrey v. Smith*, 14 Sim. 202; *Mackie v. Mackie*, 5 Hars 70); whereas sec. 345 contemplates no such direction. [N. B. The testator's direction should be given effect to, *Bate v. Hooper*, 5 De G.M. & G. 338, 344]. Here, as well as under the preceding section, there should be first conversion and then investment. Investment under sec. 345 is in the securities considered good by the High Court under sec. 341; but under this section it is in the securities specified by the testator. See Williams *On Executors*, 11th Ed. 1119 and the cases cited there. Both the secs. 345 and 346 contemplate a bequest of residue for life; and not the cases where a fund is invested with direction for the application of its income for the life of the legatee. *Vide also* the notes under sec. 347 *infra*.

347. [Pro. Ss. 126, 148 & Suc. S. 307] Such conversion and

Time and manner of investment as are contemplated by sections 345
conversion and invest. and 346 shall be made at such times and in such
ment. manner as the executor or administrator thinks
fit; and, until such conversion and investment are completed, the
person who would be for the time being entitled to the income of
the fund when so invested shall receive interest at the rate of four
per cent. per annum upon the market-value (to be computed as at
the date of the testator's death) of such part of the fund as has not
been so invested.

*Provided that the rate of interest prior to completion of invest-
ment shall be six per cent. per annum when the testator was a
Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted
person.*

Time and manner of conversion and investment are in the discretion of the Executor :—This section gives the executor (or administrator) a discretion with respect to the time and manner of conversion and investment. See *Kipping v. Kipping*, (1914) 1 Ch. 62; *Marshall v. Marshall*, (1914) 1 Ch. 192; 83 L.J. Ch. 307 (O.A.), also Williams *On Executors*, 11th Ed p. 1119, *et seq.*; Ingpen, p. 504.

Such discretion should be reasonably and properly exercised. Under the English law, if the executor makes any delay in effecting the conversion and investment without any just excuse, he will be liable for loss or depreciation resulting from the delay to the fund itself or to its income. *Howe v. Dartmouth*, 7 Ves 187; *Brice v. Stokes*, 11 Ves 819. But the executor incurs no risk by postponing conversion for a reasonable time. *Re Chancellor*, 26 Ch D. 42; *Prendergast v. Lushington*, 5 Hare, 171; *Eland v. Medland*, 41 Ch D. 476; *Re Woods*, 2 Ch. 4; *Re Chaytor*, (1906) 1 Ch 288. The Indian case-law is very poor on this subject. But having regard to the discretion vested in the executor under this section, and to the condition of Indian life, it seems that the executor's liability for non-conversion is almost nominal in this country, see *De Souza v. De Souza*, 12 Bom. H C R. 184. Cf. *Gouri v. Narayana*, 28 M L.T. 353; 7 L.W. 513: 45 I.C. 664 (a case falling under sec. 349, *infra*).

Conversion:—*Vide* notes at p. 664, *ante*. The conversion is practically compulsory, and the life-tenant has no right to insist on the residue being given to him in *specie* or in its existing condition. *Thornton v. Ellis*, 15 Besv. 193. Conversion should be made though it means reduction of the rate of interest or profit *Ibid.* Where however the life-tenant himself happens to be the executor and enjoys a higher rate of interest or profit by reason of non-conversion of an unauthorised investment into an authorised one, the remainder-man is not entitled to claim the difference, *Re Hoyle's Row*, (1912) 1 Ch 67.

Interest pending completion of investment:—The section allows to the legatee 4 p.c. interest on the money prior to completion of the conversion and investment. This rate seems to have been taken from *Meyer v. Simenson*, 5 De G. & S. 733. Under the proviso, which applies to persons to whom the Pro and Adm. Act. of 1881 applied, viz. Hindus, Mahomedan, etc., the rate of such interest is 6 p.c. As this section refers to the conversion and investment contemplated by secs. 345 and 346, its operation must be limited to the residue of the estate. It seems that this 4 p.c. interest is to come from the *corpus* of the uninvested part of such residue, which means a great ultimate loss to the remainder-man. For further information, see the following cases, *Re Woods*, (1904) 2 Ch 4; *Re Chater, supra*; *Re Goodenough*, (1896) 2 Ch 537.

348. [Pro. S. 127, D. D. A. S. 8 & Suc. S. 308] (1) Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom or by whose District Delegate the probate was, or

letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee is a ward of the Court of Wards.

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account.

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid.

(4) Money when paid in *under this section* shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

Where the Legatee entitled to immediate payment or possession is a minor:—Where a legatee is an infant, and would be entitled to receive the legacy if he were of age, the executor is not justified in paying it either to the infant or to the father, or any other relation of the infant, on his account, without the sanction of the Court, *Cooper v. Thornton*, 3 Bro C.C 97; *Dugley v. Toller*, 11 Wms. 286. It is unwise for an executor to pay the infant's legacy to his testamentary guardian, the safest course for him being to bring the money into Court, *Re Solomons*, (1920) 1 Ch. 290; also *vide Williams On Executors*, pp. 1181-87. This principle applies only in absence of any direction in the will to pay the legacy to any person on behalf of the minor. So where the will authorises payment to a particular person or guardian, the executor is competent to make payment to that person. Under sub-sec (2), if the minor be a ward of the Court, the legacy can be paid to such Court of Wards. Under sec. 11 of the Official Trustees Act (11 of 1913), the executor has power to make over the legacy to the Official Trustee. In England, the old cases (see *Walsh v. Walsh*, 1 Drew 64; *McCreaighen v. McCreaighen*, 1849, Ir Eq. 314) which authorised payment of legacies of small values to the infant's father or testamentary guardian now stand abrogated by reason of the provisions of sec 42, of the Trustees Act, 1893 (56 & 57 Vict. Cl. 63).

Sub-sec. (3): Effect of payment into Court:—Such payment gives full discharge to the executor.

Maintenance of the Minor:—The Judge or the Court of Wards (as the case may be) can, in his or its discretion under sub-sec. (4), direct the minor's maintenance to be paid out of the interest of the Legacy, in cases where the minor's

father is unable to maintain and educate him. *Greenwell v. Greenwell*, 5 Ves. 194; *Colss v. Blackburn*, 9 Ves. 470. As to the Official Trustee's powers to apply the income towards maintenance under Act II of 1913, compare *Hill v. Grant*, 29 C.D. 381.

CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.

349. [Pro. S. 128 & Suc. S. 309] The legatee of a specific Legatee's title to produce of specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

Illustrations

(i) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn or some of ewes produce lambs. The wool and lambs are the property of B.

(ii) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.

(iii) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he completes the age, is entitled to receive the notes, but the interest which accrues in respect of them between the testator's death and A's completing 18, forms part of the residue.

Produce of Specific Legacy.—Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death; and consequently from that period whatever produce accrues upon them, belongs to the legatee. *Sleech v. Thrington*, 2 Ves. Sen. 563. Thus, in the case of a specific legacy of a flock of sheep, the wool and young ones produced since the testator's death will belong to the legatee, *viz.* Illus. (i); Cf. sec. 90, *supra*. Similarly, where there is a specific legacy of stocks the dividends belong to the legatee from

the testator's death, *Brislow v. Brislow*, 6 Beav. 289; *Barrington v. Tristram*, 6 Ves. 345. *Vide Williams On Executors*, 1163-64. It is immaterial whether the enjoyment of the principal is postponed or not, *vide* illus. (ii); also Roper on *Legacy* (3rd Ed.), Vol. II, p. 227; *Spence v. Miller*, 81 L.J. Ch. 8; *Re Stevens* (1915) 1 Ch 429; *Clive v. Clive*, Kay, 600. It is on this principle that the Madras High Court has held that the legatee of a specific legacy is entitled to mesne profit in respect of the bequeathed property which was deliverable on the legatee's marriage) from the date of the testator's death, *Gauri v. Narayan*, 28 M.L.J. 868 : 7 L.W. 518. 49 I.O. 664. The executor is however not liable to pay interests on such mesne profits even though he was guilty of delay in accounting. *Ibid.*

Exception:—The produce or interest will not go with the principal, when the specific legacy is contingent, till it becomes vested, *vide Guthrie v. Walrond*, 22 Ch. D 678; *Hill v. Grant*, 24 Ch. D. 881; *Re Eyre*, (1917) 1 Ch. 857; *Vide* also illus. (iii). It forms part of the residue of the testator's estate. *Vide* the notes and cases under sec. 103, *supra*; also *Green v. Elkins*, 2 Atk 472. As to where this exception will not apply, *vide Anantha Raykurama v. Bapanna Rao*, A.I.R. 1959 Andhra Pra. 448. Comp. (1895) 2 Ch 309; (1894) 1 Ch 665.

350. [Pro. S. 129 & Suc. S. 310] The legatee under a general Residuary legatee's title residuary bequest is entitled to the produce of the produce of residuary residuary fund from the testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of.

Illustrations.

(i) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(ii) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

Produce of Residuary Fund:—The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death. *Vide* the notes and the cases under the last section. As to how a general residuary bequest is constituted, *vide* notes under secs. 102 and 103, *supra*, at pp. 202-04.

The words "should there be any surplus after the above expenditure" and similar other words have been held to create a general residuary bequest. *Dwarkanath Bysack v. Burroda*, 4 Cal. 443 (cited at p. 204, ante).

Exception:—The principle of this section will not apply where the residuary legacy is contingent in character with respect to the produce between testator's death and the vesting of the legacy. Compare the cases of 82 C. b. 1. 678 : 24 Ch. D. 321 ; (1917) 1 Oh. 857, *supra*. Such produce goes as undisposed of, to the heirs or the next-of kin, *vide Green v. Ekins*, 2 Atk. 472.

Illustrations:—As the legatee may or may not complete the age of 18, the legacy is contingent; the income accruing between the testator's death and A's completing 18 years goes as undisposed of. Cf. *Green v. Ekins, supra*. As to the effect of a provision in a will fixing the time of vesting at the age of 21, see *Soundara Rajan v. Natarajan*, 62 I.A. 310 : 43 O.L.J. 70 : A.I.R. 1926 P.C. 244.

351. [Pro. S. 130 & Suc. 311] Where no time has been fixed for the payment of a general legacy, interest begins to run from expiration of one year from the testator's death.

Exception.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

Scope of the Section: This section provides for the payment of interest in respect of a general legacy, for payment whereof no time has been fixed, and says that subject to the EXCEPTIONS hereunder, the interest begins to run after the expiration of the executor's year (*v de sec. 337, supra*), as till then the legacy is not payable. *Wood v. Penoyre*, 18 Ves. 933 (1834); *Re Ramsey*, (1917) 2 C.b. 64 : 86 I.J. Ch 514; *Walford v. Walford*, (1912) 1 Ch. 219. L.J. 1912, Ch D 828 : (1912) A.C. 688, and a direction in the will to pay the legacy "as soon as possible" does not make any difference. *Webster v. Hale*, 8 Ves. 410; *Benson v. Mawls*, 6 Madd. 15. This section, as well as the next four sections relate to interest on annuities or legacies payable by the executor, and does not apply to a sum to be paid to the legatees out of the profits of certain immoveable property,

Panchugopal v. Kalidas, 24 O.W.N. 592 : 54 I.C. 140. The statutory right to interest is not lost by delay in putting forward the claim. The position in relation to *pendente lite* interest or future interest is altogether different. The same is quite discretionary with the Court and the trial Court's discretion will not be interfered with in appeal simply on the ground that the Court has not given any reasons for the award of such interest or the refusal to award the same. *Hemangini Devi v. Anil Krishna* 17 Pat. 950 = A.I.R. 1938 Pat. 600 = 181 I.C. 288. As to the general principles governing payment of Interest on various pecuniary legacies, read *Pugsley v. Pollock*, (1948) 1 Ch 398.

Demonstrative Legacy :—Though no mention is made of a demonstrative legacy, it is not to be inferred that interests on such legacies are not allowable. In fact, for the purposes of payment of interest they are on the same footing as general legacies, *vide Mullins v. Smith*, 1 Dr. & Crm. 204 ; *Administrator-General v. A. D Christiana*, 43 Cal. 201 ; *Walford v. Walford*, *supra* ; *Chinnam v. Tadi Kunda*, 29 Mad. 155 ; *Venkataramayya v. Pitchamma*, (1926) Mad. 164 : 78 I.C. 274 ; *Administrator-General v. Gouri Debi*, 24 C.W.N. xxiii (23), that is, interest will begin to run from the expiration of one year from the testator's death, unless the case falls within the express terms of sub-sec. (2) hereof, in which case interest will run from the death of the testator. *see Rajani Kant v. Kiko Ratilal*, 34 Bom. L.R. 1124 = A.I.R. 1932 Bom. 606 = 140 I.C. 206.

Exception (1): Satisfaction of Debt :—The rule enunciated in the section does not apply when the legacy is in satisfaction of a debt of the testator, the reason being that such satisfaction is supposed to take place on the testator's death, *Clarke v. Sewell*, 9 Atk. 99 ; *Rajamanar v. Venkata Krishnaya*, 25 Mad. 961. This reasoning does not hold good when the debt is not owing by the testator but by another person. Therefore, in such a case, there will be no exception. *Ashew v. Thompson*, 4 K. & J. 60.

Exception (2): Parent etc :—Where the testator was a parent or a remoter ancestor or was a person in *loco parentis* to a minor legatee, interest shall run from the death of the testator, *Wilson v. Maddisson*, 2 Y. & C. Ch 372 ; *Rajani Kant v. Kiko Ratilal*, 34 Bom. L.R. 1124 = A.I.R. 1932 Bom. 606 = 140 I.C. 206. For the obligation of a person in *loco parentis*, *see Crickett v. Dally*, 8 Ves. 13. As regards a child *en ventre sa mire*, *see Rawlinson v. Rawlins*, 2 Cox 421.

Exception (3): Direction to pay maintenance :—Interest will be payable from the testator's death also when the legacy is to a minor with a direction to pay his maintenance. *Re Richards*, L.R. 8 Eq. 119 ; *Peckwick v. Gibbs*, 1 Bea. 271 ; *Beckford v. Tobin*, 1 Ves. sen. 310 ; *Newman v. Bateson*, 3 Sw. 689 ; *Chidgey v. Withby*, 41 L.J. Ch. 699. This exception will apply only where the legatee is a minor and not an adult. [*Raven v. Waite*, 1 Sw. 653 ; *Wall v. Wall*, 15 Esm. 513] ; it

applies to a minor and not to a wife, [*Stent v. Robinson*, 12 Ves 461; *Re Percy*, 24 Ch. D. 616; *Re Ramsey*, (1917) 2 Ch. 64 (*supra*)]. It applies where the legacy is to the minor directly and not for the benefit of another person, *Re Crave*, (1908) 1 Ch. 379. Cf. *Re West*, (1919) L.J. Ch. D. 488. The exception does not say that the minor should be related to the testator; so the term will include a non-related minor legatee. See *Theobold on Wills*, 7th Ed. 187.

352. [Pro. S. 131 & Suc. S. 312] Where a time has been fixed Interest when time for the payment of a general legacy, interest fixed. begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance or unless the will contains a direction to the contrary.

N. B.—“The words added have been taken from sec 131 of Act V of 1881”—
Joint Committee Report.

Scope of the Section:—This section differs from the preceding one in the fact that it contemplates time having been fixed for the payment of the general legacy. The general rule is that when time is fixed for the payment of the legacy, interest will run only from the appointed time and not from the testator's death; see *Tyrell v. Tyrell*, 4 Ves. 1; *Heath v. Perry*, 8 Atk. 101; *Earley v. Bellingham*, 24 Beav. 448. If the time for payment is fixed, the above principle will apply notwithstanding the fact that the legacy is vested, *Crickett v. Dolly*, 8 Ves 10, *Festina v. Allen*, 5 Hare, 575 (577). But if the will directs the payment to be made “with interest,” such interest will be calculated since the expiration of the executor's year, *Knight v. Knight*, 2 Sim. & Stu. 490. There is exception to the above general rule, for which *vide* the next paragraph. The exception does not apply unless the legacy proceeds from a parent, or a remoter ancestor or a person *in loco parentis*. *Houghton v. Harrison*, 2 Atk. 330. See also *Williams On Executors*, 11th Ed pp. 1159, 1159. The general rule also does not apply where the legacy is by a direction in the will, separated from the testator's estate; in such a case the legacy carries the *interim interest*, *Re Inman*, (1893) 3 Ch. 518; *Re Clement*, (1894) 1 Ch. 665.

Exception:—An exception to the general rule that *interest runs from the appointed time* will be made, when the legatee is a minor and the legacy comes from a parent, or remoter ancestor or a person *in loco parentis*, and no sum is given

for the minor's maintenance. *Vide, Administrator-General v. Gouri Debi*, 24 C.W.N. xxiii (23). In such a case interest runs from the testator's death and not from the appointed time and virtually serves the purpose of a maintenance allowance; see *Wynch v. Wynch*, 1 Cox 438; *Harrey v Harvey*, 2 P.Wms. 21; *Wall v. Wall*, 15 Sim. 513; *Raven v. Waite*, 1 Sw. 558. Where a specific sum is given by the will for the minor's maintenance, no exception need be made to the aforesaid general rule. *Vide* the above cases; also *Aynsworth v. Pratchett*, 18 Ves. 321; *Turter v. Turner*, 4 Sim. 430; *Harle v. Greenbank*, 8 Atk 716. If the minor legatee dies in the life time of the testator, the benefit of this exception will be extended to his or her lineal descendant who will take the legacy by virtue of the provisions of sec 109, *supra*, see *Jitulal v. Binda Bibi*, cited at p. 216, *ante*.

353. [Pro. S. 132 & Suc. S. 313] The rate of interest shall be four per cent. per annum in all cases except when Rate of interest. the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, in which case it shall be six per cent. per annum.

Interest:—As to how far the statutory right of interest is defeated by a belated claim, read the notes at p. 671, *ante*. For *pendente lite* interest and future interest, read the notes there.

Rate of Interest:—The rate is 4 p.c. in the case of persons to whom the Act of 1865 applied and 6 p.c. in the case of those to whom the Act of 1881 applied. *Vide* notes on the proviso to sec 347, *supra*.

Interest, simple or compound:—The section itself is silent on the point. But according to Williams *On Executors*, 11th Ed. p. 1472, compound interest may be allowed under exceptional circumstances; though ordinarily, the interest should be simple.

354. [Pro. S. 133 & Suc. S. 314] No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

The arrears of an annuity for the first year do not carry any interest for the simple reason that the first payment of it is to be made only at the expiration of a year from the testator's death, *vide* sec. 388-89, *supra*; also *Lainson v. Lainson*, 18 Beav. 7; Williams, *On Executors*, 11th Ed. p. 1167.

355. [Pro. S. 134 & Suc. S. 315] Where a sum of money is interest on sum to be invested to be invested to produce an annuity, interest is payable on it from the death of the testator.

This section virtually makes an exception to the general rule of the last section. Where a sum is directed in the will to be invested to produce an annuity, it will, notwithstanding anything contained in sec. 354, carry interest from the testator's death, *vide* the notes under sec. 343, *supra*.

N.B.—For the general application of secs. 351-355, *vide Panchugopal v. Kalidas*, 24 C.W.N. 592 : 54 I.C. 140 (cited at p. 671, *ante*).

CHAPTER XII.

OF THE REFUNDING OF LEGACIES.

356. [Pro. Ss. 135, 148 & Suc. S. 316] When an executor or administrator has paid a legacy under the order of a Court, he is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

Refund of Legacy paid under Court's order:—Where an executor has paid a legacy under compulsion of a suit he can compel a refund from the legatee, in case the assets prove insufficient, *Newman v. Barton*, 2 Vern. 205; *Noel v. Robinson* 2 Ventr. 368 See Walker and Flg. 209 The word "Court" must necessarily mean any Civil Court. This section will not apply unless the payment of legacy is under an order of a Court. Where the executor makes the payment voluntarily there will be no right of refund hereunder, *vide* sec. 867, *infra*; especially if he pays the legatee with notice of a debt, *Jervis v. Wolferston*, L.R. 18 Eq. 18. The expression "notice of a debt" does not include the notice of a possible remote claim, which may or may not ripen into a debt, *Wittaker v. Kershaw*, 45 C.D. 320 Of Sec 359, *infra* A voluntary payment by mistake though not coming under this section, may entitle the executor or administrator to a refund Thus, where an annuity not due was paid by mistake, the Court held that the executor was entitled to set off such payment, or credit it, against a future payment of annuity, *Livesey v. Livesey*, 3 Russ. Ch. O. 287; *vide also Williams On Executors*, 11th Ed. p. 1189; *Ingpen*, p. 524.

357. [Pro. S. 136 & Suc. S. 317] When an executor or administrator has voluntarily paid a legacy, i.e. No refund if paid cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No Refund in case of voluntary payment:—The executor or administrator has no right to compel a refund from the legatee when he pays the legacy, *voluntarily* (as distinguished from *compulsorily* under the preceding section). "When ever an executor pays a legacy, the presumption is that he has sufficient to pay all the legacies; and the Court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he *voluntarily* paid, to refund,"—per Strange, M.R. in *Orr v. Kaines*, 2 Ves. Sep. 194; see also *Coppin v. Coppin*, 2 P.Wms. 296; *R v. Horne*, (1905) 1 Ch. 70. A payment cannot strictly be called *voluntary* when made under a mistake, *vide Livesey's case*, cited under the last section. See *Williams*, 11th Ed. p. 1189; *Ingpen*, p. 624.

358. [Pro. S. 137 & Suc. S. 318] When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor or administrator has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed under section 137 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator, but those to whom he has paid it are liable to refund the amount.

Refund when legacy has become due on performance of condition within further time allowed under sec 137.

This section deals with the question of the claim of a legatee who performs the condition imposed on him within the extended time allowed by sec 137, *supra*, in respect of assets which are already distributed by the executor or administrator without fraud and says that in such a case the legatee, performing the condition not within the time originally specified but within the period extended under sec. 137, shall claim refund not from the executor or administrator but from the persons among whom the assets have been distributed in good faith. As to under what circumstances the time for performance of the condition can be extended, *vide* the notes and cases at p. 281, *ante*. *Vide also Williams, On Executors*, 11th Ed. pp. 1189, 1494.

359. [Pro. S. 138 & Suc. S. 319] When the executor or administrator has paid away the assets in legacies when each legatee is compellable to refund and he is afterwards obliged to discharge a debt of proportion. which he had no previous notice he is entitled to call upon each legatee to refund in proportion.

Proportionate Refund from Legatees when new Debts discovered — If the executor pays away the assets in legacies, and afterwards a debt appears, which he is obliged to discharge and of which he had no previous notice, he can compel proportionate refund from the legatees whom he has already paid. *Nelthorpe v. Biscie*, 1 Ch. Ca 186; *Dos v. Guy*, 3 East, 120 (128). This section will not apply unless (1) the executor is obliged to discharge the debt, and (2) want of previous notice is shown. Therefore, an executor cannot compel refund where he has paid away the assets with notice of a debt. *Jervis v. Walserton*, L.R. 18 Eq 18 (reduced under sec. 366, *supra*). A notice of a mere possible or contingent liability is not such notice as will debar the executor from claiming a refund under this section. *Whittaker v. Ker haw*, 45 O.D. 820. *Vide also Williams*, 11th Ed. pp 1189, *et seq.*; *Roper on Legacies*, Vol. 1, p 398.

360. [Pro. S. 139 & Suc. S. 320] Where an executor or administrator has given such notices as the High Court may, by any general rule, prescribe or, if no such rule has been made, as the High Court would give in an administration-suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution :

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

"This clause reproduces section 320 of the Act of 1865 and sec. 139 of the Act of 1881. It would be preferable if the wording of sec. 139 had been adopted, but this would involve a slight change in the law"—*Notes on Clauses of the Original Bill*. The words 'as the High Court may by any general rule prescribe' have been taken from the Act 1881, and the words, "as the High Court would give in an administration suit" have been taken from the Act of 1865.

The Section — It corresponds to sec. 29 of Lord St. Leonard's Act (23 & 24 Vict. C. 35), and provides that an executor or administrator after giving proper notices (*vide* below), will be entitled to distribute the assets among the rightful claimants, as he knows of, and that after such distribution, he will not be any more liable for the debts which he has had no notice of. But such distribution will not prejudice the right of a creditor or claimant to follow the assets in the

hands of persons who have received them. *Vide* the *Proviso*. "Distribution" here is not restricted to payment of legacies but covers payments in discharge of creditors also, *Mathuradas v. Raimal*, 37 Bom. L.R. 642—A.I.R. 1985 Bom. 855—159 I.C. 583. The remedy of an aggrieved creditor or claimant "is against those who have received the assets, and not against those who have parted with them," *Clegg v. Rowland*, L.R. 9 Eq. 368. Read the notes at p. 638, under the heading, "Creditor's Remedy." Compare this section with sec. 42 of the Trustees' and Mortgagors' Act, 1866 and sec. 26 of the Administrator-General's Act (III) of 1918.

Proper Notices:—The section contemplates such notices as the High Court may, by a general rule prescribe, or if no such rule has been prescribed, as the High Court would give in an administration-suit for creditors and others. For the form of advertisement or notice on the creditors to come in with their claims as prescribed by the High Court, *vide* Belchambers Rules, p. 411 (new Ed.) and the APPENDIX, *infra*. In determining whether a proper notice has been given or not, the Court will have regard to the circumstances of each case and decide the matter with reference to time, place and the position of the party and so forth, *Re Bricken*, (1889) 43 C.D. 1; *Clegg v. Rowland*, *supra*. The notice or advertisement should be given as early as possible, *Re Key*, (1897) 2 Ch. 518.

And others:—The form prescribed by the High Court (*vide* APPENDIX) does not show who these *others* are; but the term seems to include the next-of-kin, see *Newto v. Sherry*, cited in Williams, 10th Ed. p. 1669.

Effect of Proper Notice:—The service of a proper notice gives complete protection to the executor or administrator, *Clegg v. Rowland*, *supra*; *Hunter v. Young*, Ex. D. 256.

Shall not have had Notice:—An executor or administrator tainted with notice of a claim is no. protected under this section, *Markwell's case*, 21 W.R. (Eng.) 186; *Scottish v. Eatly*, 29 L.R. 1r 290. When he has notice of a claim, he cannot avoid liability by pleading absence of response to his advertisement, *Ibid.* It seems that the executor's liability arises only upon *actual* notice, and not a mere *constructive* notice. *Vide* at p. 640, *ante*. Decision of the Court that the case of the minor legatee was governed by sec. 180, arrived at when the minor was not represented by a guardian is not binding on the minor, *Tessia J. Garrad v. Millicent Ann*, A.I.R. 1964 Mad. 227.

Proviso: Rights of after-coming Creditor's etc.:—So long as the fund is in Court or with the Accountant-General, a creditor or a claimant can be let in at any time, if not guilty of *laches*, see *Rose v. Biddadharji*, 9 C.W.N. 167. But a creditor who has been remiss cannot intervene to the prejudice of more vigilant and diligent creditors, *Lashley v. Hogg*, 11 Ves. 602; *Kisondas Premchand v.*

Jivatnal Pratapshi & Co., 38 Bom. L.R. 864—A.I.R. 1936 Bom. 428—167 I.C. 529. Where the executor has already distributed the assets after notice under this section, the after-coming creditor has no more remedy against him, see *Clegg v. Rowland*, *supra*. His remedy then lies by a suit for proportionate refund against the legatees who have received the assets, *vide* sec. 361; see also *Gillespie v. Alexander*, I Russ. Ch. Ca. 196-7. Cf. *Hodges v. Waddington*, 2 Vent. 300; *March v. Russell*, 8 M. & Cr. 81. The right of a creditor against the legatee under this proviso may be lost by laches, waiver, acquiescence, estoppel or limitation, *Ridgway v. Newstead*, 30 L.J. Ch. 889. From the above notes it is apparent that the proviso only limits the effect of the notice only to the question of the executor's liability; it leaves the other rights (e.g. the right to follow the assets or the overpaid parties) untouched, *Mathuradas v. Raimal*, 37 Bom. L.R. 642—A.I.R. 1936 Bom. 885—169 I.C. 593. The proviso does not create a right but saves one if the statute has given it, *Kissondas Premchand v. Jivatnal Pratapshi & Co.*, 38 Bom. L.R. 864—A.I.R. 1936 Bom. 428—167 I.C. 529, *supra*. It saves the right which sec. 361 has given, *Ibid.*

Limitation:—The suit to compel a refund by the legatee should be instituted within three years from the date of payment or distribution by the executor under Art 43 of Sch I of the Indian Limitation Act, 1908; *vide* new Art 46.

361. [Pro. Ss. 140, 148 & Suc. S. 321] A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor or administrator was voluntary or not.

Creditor may call upon legatee to refund.

Creditor's claim for Refund:—An unsatisfied creditor can compel refund from a legatee whose legacy has been paid. *Hodges v. Waddington*, 2 Vent. 300. It does not make any difference (1) whether the assets left by the testator were or were not sufficient to pay both the legacies and debts, and (2) whether the payment of the legacy was voluntary or not, *Jerris v. Wolverston*, L.R. 18 I.Q. 18 (26); nor does it make any difference that the executor himself is the Creditor, *Ibid.* Therefore, if a specific legatee cannot resist a claim for refund hereunder on the plea that there is property not specifically bequeathed available to satisfy the creditor's claim, *Suvil K Mittra v. Samarendranath Mittra*, 42 C.W.N. 66 Comp. *Kissondas Premchand's* case, cited under the last section; also *Abdul Aziz v. Dharam C. Jetha & Co.*, 42 P.L.R. 427—A.I.R. 1940 Lah. 348—190 I.C. 506. The Creditor's claim for refund is not affected by the fact that the payment of the legacy was made without notice of his claim, (*vide* sec. 360, *supra*), *March v. Russell*, 8 M. & Cr. 81. A legatee holding as a trustee of a trustee is within the

scope of this section Cf. I.L.R. (1946) Mad. 707 - (1946) 2 M.L.J. 525 - A.I.R. 1946 Mad. 209 - 226 I.C. 196. The legatees called upon to refund under this section are to pay their respective portions of the creditor's claim, *Gillespie v. Alexander*, 8 Russ. Ch. Ca. 110. But see *Davies v. Nocolson*, 2 DeG. & J. 698 (a case of administration by the Court).

Procedure for enforcing the claim for refund:—The right of a creditor to follow assets in the hands of a legatee is a right which has to be exercised by a separate suit. But where the executor himself is the specific legatee, the administration decree is in the nature of a decree passed against a legal representative of a deceased person within the meaning of sec 52 (1) of the C.P. Code and it can be executed directly by attachment and sale of the property in the hands of the executor specific legatee. The creditor need not be relegated to a separate suit, *Susil K. Mittra v. Samarendra Nath Mittra*, 42 C.W.N. 65.

How the Creditor's Right may be lost:—It may be lost by laches, limitation etc. on his part, *vide* under the last section, at pp. 677-78, ante

Bona fide purchaser for value from the Legatee:—An unsatisfied creditor cannot however follow the assets in the hands of a *bona fide* purchaser for value from the Legatee, *Graham v. Drummond*, (1886) 1 Ch. 968. Or, in other words, the word "Legatee" in the section does not include a *bona fide* transferee from him. Cf. *Noble v. Brett*, 24 Beav. 490. A subsequent mortgage in good faith of a legacy, paid and delivered, prevails against an unsatisfied debt, the reason being that (i) the *bona fide* mortgagee has an indefeasible equity, (ii) the unsatisfied debt does not create any lien. See *Graham v. Drummond*, *supra*. The correctness of this decision has been recognised by the Judicial Committee (through proceeding on other grounds) in *Bank of Bombay v. Suleman*, 86 I.A. 100: 38 Bom. 1: 22 C.W.N. 998 (P.C.).

362. [Pro. S. 141 & Suc. S. 322] If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under section 361, cannot oblige one paid in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

Unsatisfied Legatee's position:—If the assets were originally sufficient, that is, at the time of testator's death, an unsatisfied legatee or a legatee compelled to refund under sec. 361, cannot call upon a satisfied legatee (who was paid in full with or without suit) to refund, *vide Roper on Legacies*, Vol. I, p. 459: Williams,

p 1192. Subsequent *devastavit* by the executor will not make any difference, *Ibid.* The whole test for the applicability of the section is whether the assets were sufficient at the testator's death; subsequent deficiency whether resulting from the accidental causes or devastation by the executor is of no account, *Fenwick v. Clarks*, 31 L.J. Ch. 731. So where the assets were originally deficient, this section will not apply, and an unsatisfied legatee can call for a refund, *Walcott v. Hall*, 1 P.Wms 406 : 2 Bro. C.C. 305 ; *Paterson v. Paterson*, L.R. 8 Eq. 111 ; *Dowsett v. Culver* (1892) 1 Ch 210 ; but the onus will be on him to prove such original deficiency, *Ibid.*

363. [Pro. S. 142 & Suc. S. 323] If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor or administrator if he is solvent; but if the executor or administrator is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

When unsatisfied legatee must first proceed against executor, if solvent.

The unsatisfied Legatee to proceed first against the Executor:—We have seen under the last section that an unsatisfied legatee has a right to claim a refund where the assets were originally insufficient. *Vide* the cases cited under sec 362. This section lays down that the remedy of such an unsatisfied legatee, is, at the first instance, against the executor, if solvent. *Orr v. Kaines*, 2 Ves. Sen. 194, see also *Roper on Legacies*, Vol. I. 459 (4th Ed.) ; Williams, 11th Ed. p. 1192. The reason of this rule is that payment by the executor, in case of insufficient assets, to some, is tantamount to *devastavit* by him. Cf. *Orr v. Kaines, supra*; *Bakshi Ram v. Lalita Devi*, A.I.R. 1960 Punj 281. The unsatisfied legatee may frame his relief in the alternative, first against the executor, and in the event of his insolvency or non-liability, against every other satisfied legatee. For alternative reliefs, see *Alliance Bank v. Kahan*, 111 P.W.R. 1914. 26 P.L.R. 1914 : 4 P.R. 1915 : 25 I.C. 866 ; *Bhagawati v. Parameshwar*, 86 All., 476 : 12 A.L.J. 798 : 25 I.C. 289. Cf. 17 C.W.N. 427 ; 34 Cal. 51 ; 18 All. 125. In a suit by a residuary legatee for administration, the Court can compel refund from the residuary legatee for the purpose of payment to unsatisfied legatees who are absent and not parties to the suit, *Prowse v. Supurgin*, L.R. 5 Eq. 99. No question of refund arises in relation to any person who has received no part of the testator's assets, read *Bakshi Ram v. Lalita Devi, supra*.

364. [Pro. S. 143 & Suc. S. 324] The refunding of one legatee Limit to refunding of to another shall not exceed the sum by which the one legatee to another. satisfied legacy ought to have been reduced if the estate had been properly administered.

Illustration.

A has bequeathed 240 Rupees to B, 480 Rupees to C, and 720 rupees to D. The assets are only 1,200 rupees and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

Limit to Refund:—This section lays down the limit to which the refunding by one legatee to another should go. The amount of refund should not exceed the sum by which the satisfied legacy would have been reduced in case of proper administration of the estate.

365. [Pro. S. 144 & Suc. S. 325] The refunding shall in all Refunding to be without cases be without interest.

The Refund-money not to carry interest:—The section lays down an equitable rule that the person, to whom a payment is made erroneously, should not be charged interest when he is called upon to refund the amount received by him; see Williams *On Executors*, 11th Ed. p. 1193 ; Cf. *Gillms v. Steele*, 1 Swindt 200.

366. [Pro. S. 145 & Suc. S. 326] The surplus or residue of Residue after usual payments to be paid to the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will

Residue, after payment of debts and legacies, to be made over to Residuary Legatees:—After the debts and legacies have been all paid, the residue should be paid to the residuary legatee, if any such legatee has at all been appointed by the will, see Williams, 11th Ed., p. 1194 ; *Brown v. Farnell*, Garth 52. When at the end of the executor's year (see sec. 387) the executor reduces into possession the estate of the deceased and pays all the debts and legacies, the residue becomes free for enjoyment by the residuary legatee or in his absence becomes divisible among the heirs, *Macleod v. Sorabji*, 7 Bom. I R. 755. As Legatee becomes soon as the administration is complete, the debts and legacies "owner."

are paid and residue ascertained the residuary legatee becomes the owner or proprietor of the property, and then the executor is bound to make it over to him, *Ganoda Chowdhurani v. Nalini R. Raha*, 86 Cal 28 : 12 O.W.N. 1065 ; *Secretary of State v. Parsat Debi*, 60 Cal. 1195 - 97 C.W.N. 769 - A.I.R. 1933 Cal. 844. Although the residuary legatee dies before the payment of debts, and before the amount of surplus is ascertained, yet it shall devolve upon his personal representatives, Williams *On Executors*, 11th Ed., p. 1193, *et seq.* As to what property the residuary legatee is entitled to, vide sec. 103, *supra*.

his rights, see *Sudley v. Attorney-General*, (1897) A.C. 11; *Wrightwich v. Lord*, 6 H.L.C. 217 (226); and the cases cited at pp. 202-06, ante.

When the Executor becomes functus officio:—The office of an executor lasts so long as the estate is not fully administered and the terms of the will are not carried into effect, *Taran Singh*, 31 Cal. 89 (92. 93); vide also *Sankar v. Biddutlata*.

28 O L J. 271 (cited at p. 624, ante). The executorial duties fully administered.

When the estate is end when the debts and legacies are paid and the residue ascertained, *Solomon v. Attenborough*, (1911) 2 C. b 169. After the estate is so administered, the executor becomes, in respect of the properties in hand, a trustee for the residuary legatee or the heirs as the case may be, *Lord Brougham v. Lord Poulett*, 19 Beav. 184. Cf *Davenport v. Stafford*, 14 Beav. 331; *Ex parte Dover*, 5 Sim. 600; *R. v. Tensmis*, (1902) 1 Ch. 176. Vide also the cases at p. 610, ante. Read *Ajit K. Saha v. Nagendra Nath Saha*, A.I.R. 1960 Cal. 484.

367. [Pro. S. 145 A. & Suc. S. 326 A. and P. A. A. of 1890,

Transfer of assets from India to executor or administrator in country of domicile for distribution. Where a person not having his domicile in India has died leaving assets both in India and in the country in which he had his domicile at the time of his death, and there has been a grant of probate or letters of administration

in India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in India, after having given such notices as are mentioned in section 360, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

This section comes in here by virtue of sec. 9 of Act II of 1890. Compare this section with the provision of sec 98 of the Administrator-General's Act. (III of 1913). Vide also the following cases, *Eames v. Hacon*, 18 C.D. 847 (851); *Cook v. Gregson*, 2 Drew. 286; *Blackwood v. Queen*, 8 A.C. 92; *Ewing v. Orr*, 10 A.C. 483; *Re Cloche*, 28 O.D. 175.

Transfer of assets from India to the country of Domicile:—The section contemplates two grants, the principal or domiciliary grant being made in the country of the deceased's domicile, and an ancillary grant being made in this country in respect of the assets left here; and authorises the grantees in India to proceed and distribute the Indian assets in accordance with the provisions of sec 360,

and forward the surplus or residue to the domiciliary grantee for distribution in the country of domicile. Cf. *Ewing v. Orr-Ewing*, 9 A.C. 34; *Hames v. Bacon*, 18 U.D. 347 (351); *Cook v Gregson*, 2 Drew, 286 (288). The rule of this section

This rule is not here may or may not avail himself of the provisions of this absolute.

is not absolute, *vide* the word "may"; the auxiliary grantee section, and the Court here may for good reasons disallow the transfer of assets from India to the country of domicile, *Hamilton v. Levy*, 41 S.C. 374 : 19 S.E. 610. Such transfer is possible only if the domiciliary grantee consents (see the words "with the consent etc."), and the Courts here will have no power over him to compel him to adopt any particular course of action, *vide Lewis v. Grogard*, 17 N.J. Eq. 425; *Freeman's Appeal*, 68 Pa. St. 161.

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

368. [Pro. S. 146 & Suc. S. 327] When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Illustrations.

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(ii) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss. [See *Thompson v. Thompson*, 9 Price, 476].

(iii) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss. [See *Rowley v. Adams*, 4 M. & Or. 534].

Liability of executor not accepting office:—Obviously an executor who has kept aloof and has not accepted office, has not been made liable by this section, *Bakshi Ram v. Lilan Devi*, A.I.R. 1960 Punj 231.

Devastavit:—The term means a waste of the estate of the deceased by an executor or administrator, either by extravagance or misapplication of the assets

or mismanagement of the estate; *vide Williams On Executors*, 11th Ed., 1416^o et seq.¹ The general rule regarding executor's liability on account of devastation is founded on two principles: (1), that care should be taken to guard against abuse of trust (2) that while preventing abuse of trust the Court should not be unnecessarily rigorous towards the executor and should show him every possible concession, otherwise, overstrictness of the Court might deter people from undertaking such onerous offices. See *Powell v. Evans*, 6 Ves 848; *Ruyhaek v. Bahm*, 13 Ves. 410. Thus, though the executor will be liable for an improper sale, *Rico v. Gordon*, *infra*, still the Court will not be severe on him and will not hold him liable if he acts bona fide in the matter, *Selly v. Bourne*, 9 Jur (N.S.) 425.² The honest acts of the executor will always be protected, *Marsden v. Kent*, L.R. 5 Ch. D. 598, *Buxton v. Buxton*, 1 My. & Cr. 80. When the executor becomes liable under this section, he cannot avoid his liability by throwing the responsibility on the advice he got, *Vez v. Emery*, 6 Ves 141 (144), *Peers v. Ceeley*, 15 Beav. 211. He is to thank himself for the wrong advice he acts upon, *Doyle v. Blake*, 2 Ch. & Leif. 243; *Re Knights Trusts*, 29 Beav. 49. The executor will be guilty of *devastavit*, if he grants an extension to a lessee detrimental to the estate, *Oceanic S. N. Co v. Sutherland*, L.R. 16 Ch. D. 286. He will be liable if he fails to account for the properties in his possession *Aga M. Iahim v. Muzza Ali* 4 W.B. 106 (P.C.). A compromise by the executor prejudicial to the interest of the estate is *devastavit* *Khusruhai v. Normushji*, 17 Bom. 637, *vide* notes under the next section. Where the executor carries on the testator's business he has the liability when the same liabilities, as he has in respect of the other properties executor carries on of the testator, *Sudhir v. Kamal*, 46 Cal. 618; 21 C.W.N. testator's business. 1043, *vide also Jeihulat v. Chotalal*, 34 Bom. 209; *John Hornby v. Oxley*, (1814) 1 Ch. 604; *London Country v. East*, 1914 W.N. 16; *Chattar v. Doras*, 32 Mad. 490, *Official Assignee v. Naidu*, 33 Mad. 164. For the executor's liability for the debts incurred for carrying on the trade, *vide Re John on*, 15 Ch. D. 348, *Kirman v. Booth*, 11 Beav. 280; *Re Morgan*, 18 Ch. D. 93; *Dowse v. Gorton* (1891) A.C. 190, *Re Brice*, (1894) 2 Ch. 100. *Vide also* the notes at p. 616. If an executor improperly appoints another to receive the money of the testator, and that person makes default this is *devastation*, *Jenkins v. Plombe*, 6 Mad. 41, *Lakshmidas v. Jai Kavarbai*, 29 Bom. 170. So leaving money unnecessarily in the hands of an agent and thereby facilitating misappropriation by such agent is *devastation* *Ghosh v. Waller*, 9 Beav. 497; *Bostock v. Floyer*, L.R. 1 Eq. 26; *Singh v. Gaunt*, 9 A.C. 1. But a difference will be made when the employment of agent is proper and the loss does not result from the wilful default of the agent *Re Brice*, L.R. 26 Ch. D. 298. No liability will arise where the agent is employed in due course of business, *Edwards v. Peake* 7 I.C. 959, *Lacon v. Bacon*, 5 Ves 384, it is incumbent on an executor to act with the same degree of care and diligence as a man of ordinary prudence would Negligence, in his own affairs; so loss to the estate resulting from the executor's want of diligence, both in the selection of, and supervision over, the

agent, must be borne by him, 29 Bom. 170; *Cf. Bricé v. Evison*, 26 Ch. D. 288 (C.A.); *Shepherd v. Harris*, (1905) 2 Ch. 810; *Blundell v. Blundell*, 40 Ch. D. 370. Vide also note at p. 632, ante. The same principle applies where the executors appoint one of their body to be their agent, *Tiplis v. Harrell*, 19 Beav. 428; *Homes v. Pringle*, 8 Ch. & Fin. 284. He is liable for allowing considerable funds to lie unproductive, *Moyle v. Moyle*, 2 Russ. & My. 710; *Cf. Chal'en v. Shiyam*, 4 H.L. 555; *Ridien v. Wesley*. But no liability attaches to him for leaving a reasonable balance in the banker's hands especially if it be for the purpose of current business, *Swinfen v. Swinfen*, 29 Beav. 211; *Wilks v. Groom*, 25 L.J. Ch. 278; *Edmunds v. Peak*, 7 Beav. 239; *Bacon v. Bacon*, 5 Ves. 334; *Chambers v. Chambers*, 7 Ves. 198. Negligence covers cases of omission in converting property at the right moment, that is, when the prices have not yet fallen off, *Fry v. Fry*, 27 Prev. 144; *Taylor v. Taburn*, 7 Sim. 28; *Grayburn v. Clarkson*, L.R. 8 Ch. 605. Vide notes under the Executor in the next section. The executor is in the position of a gratuitous position of a *gratuiti bailee*, and not liable except for *wilful default*. *Jcb v. Job*, 2 Ch. 562. Cf. *Re Symons*, L.R. 21 Ch. D. 757.

While charging an executor for *wilful default* at least one instance of *wilful default* has to be made out, *Massy v. Massy*, 1 J. & H. 728; *Cf. Re Bouen*, L.R. 20 Ch. D. 548. If the executor delays payment of a debt and liable only for *wilful default* in consequence the creditor obtains decree for principal with interest, that will be *derastavit*, *Seaman v. Everard*, 2 Lev. 40; he ought not to allow interest to swell, while he has funds in his hands, *Hall v. Hillitt*, 1 Cox. 134. The law casts a duty on the executor to make investments in the authorised securities. (Cf. see 341, supra); therefore

Investments by Executor. An executor will be responsible for making investments in improper and unauthorised securities, *Walker v. Symonds*, 3 Swan 63; *Stickney v. Sewell*, 1 M. & C. 8; *Drupai v. Andoor*, 38 I.C. 604 (Mad.); he will be likewise liable if he allows moneys to remain on personal security for an unnecessarily long time, *Pewell v. Evans*, 5 Ves. 899; *Lowson v. Coyleland*, 2 Bro. C.C. 156; that is, he will be liable if the personal security proves defective, *Adye v. Fenlon*, 38w 84 Cf. *Re Laing*, (1899) 1 Ch. 132; *Re Barclay*, (1899) 1 Ch. 674; *Re Grinley*, (1898) 2 Ch. 593. When the testator's monies are invested in improper securities, the executor should realise them with all possible expedition, *Hughes v. Empson*, 22 Beav. 181; *Grayburn v. Clarkson*, L.R. 8 Ch. 605. The following have been considered direct acts of abuse on the part of an executor or administrator, and are therefore *derastavit* under this section: (i) actual misappropriation of the funds, *Nagaratnammal v. Numasiraya*, 7 M.L.J. 123. (ii) utilising the funds in payment of his own debts, *Fugent v. Gifford*, 1 Atk. 463; *Scott v. Tyler*, 2 Dick. 725; (iii) applying the assets in payment of unfounded claims, *Manning v. Purcell*, 7 DeG. & M. 55; *Vez v. Dmery*, 5 Ves. 141; Vide also illus. (i); *Salmurst v. Barrett*, 31 Beav. 349, not followed in *Fowell v. Hulkes*, 39 O.D. 552; (a barred debt will not however be necessarily considered to be such an unfounded claim, *Norton v. Fresher*, 1 Atk. 526. An executor would,

however, commit a *devastavit* if he pays a debt which has been judicially declared to be barred by limitation, *Midgley v. Midgley*, (1898) 8 Ch. 282. Cf. *Shallcross v. Wright*, 29 Beav. 376] (iv) disposing of property at an under value, *Ries v. Gordon*, 11 Beav. 265; (v) unauthorised use of the funds for the executor's own purpose, even if temporary, *Re Cowie*, 6 Cal. 70. (vi) payment where there is no obligation to pay : e.g. where the executor pays the school-fees or clothing expenses of the testator's children, he will be guilty of *devastavit* as against the creditors, *Giles v. Dyson*, 1 Stark. N.P.C. 32. The following are instances of misapplication of assets, and are therefore *devastavit*; (a) payment of expenses and debts out of their legal order in contravention of the provisions of sections 320-28; so payment of debts otherwise than equally and rateably is *devastavit* and the executor will be personally liable to the creditor who suffers loss because of the adoption of this wrong course, *Asiatic Banking Co. v. Viegas*, 8 B.H.C.R. 20 (O.O.); (b) payment of a legacy, where the assets are insufficient to pay all the debts, *Knatchbull v. Fearnhead*, 3 My. & Or. 122; (c) releasing a debt not for the benefit of the estate, *Blue v. Marshall*, 9 P.Wms. 381; (d) spending an unreasonable amount within the meaning of sec. 320, *supra*, *Hancock v. Padmore*, 1 B. & Add 260 (cited at p. 624, *ante*); (e) renewing a lease, *vide supra*. Complaints against the executor on account of diverse acts of mal-administration may be included in the same administration suit, *Nistarina v. Nundolal*, 26 Cal. 891 : 3 C.W.N. 670; a successor in administration is entitled to maintain a suit for losses for mal-administration or *devastation* against his predecessor, *Barada Paosad v. Gajendra*, 9 C.L.J. 388 : 18 C.W.N. 667.

Devastavit by Co-executor:—A *devastavit* by one of two executors or administrators will not charge his companion provided he has not intentionally or otherwise contributed to it; for the misplacing of confidence by the testator in one person shall not operate to the prejudice of the other, see *Satya Kumar v. Satya Kripal*, 10 C.L.J. 603 (at p. 516); 9 I.C. 247, referring to *Williams v. Nixon*, (1840) 2 Beav. 472. *Vide also Williams*, 11th Ed., 1460; *Muhomed Ahmed v. Pedro*, 7 B.L.R. 691; so, an executor shall not ordinarily be liable for the assets collected by his co-executors, *Ibid*; also *Longford v. Cascogna*, 11 Ves. 333. But an executor who is a contributory to the *devastavit* of another executor will be liable, *Hewitt v. Foster*, 6 Beav. 259; *Shipbrook v. Hinchinbrook*, 11 Ves., 252; *Chandler v. Tillet*, 22 Beav. 268. It is the duty of the executors to watch over, and, if necessary, to correct the conduct of each other, and therefore an executor who stands by and sees a breach of trust committed by his co-executor, becomes responsible for that breach of trust, *Styles v. Guy*, (1848) 1 Mac & G 422 (438); *Horton v. Brockbey-hurst*, (1858) 29 Beav. 504, cited at p. 615 of 10 C.L.J. 608 (*supra*). Also *Dix v. Burford*, 19 Beav. 412; *Booth v. Booth*, 1 Beav. 126; *Horton v. Brochlehurst*, 29 Beav. 510. But there is no liability for such standing aloof, if the *devastavit* by a co-executor is committed with the concurrence or acquiescence of the beneficiaries themselves, *Griffith v. Porter*, 25 Beav. 236, inasmuch as then the beneficiaries

themselves will be estopped from holding anybody liable, see *Davis v. Hodgson*, 26 Beav. 177; *Re Baker*, 20 O.D. 290; *Walkers v. Symonds*, 8 Swinst. 1; *Dixon v. Dixon*, 9 O.D. 587; *Re Hulkes*, 88 C.D. 552; thus where the administrator paid a certain, disputed debt with the consent of the members of the testator's family, the latter were held estopped from questioning the validity of the payment, *Ardesher v. Manchester*, 12 Bom. L.R. 53. Before applying this rule of estoppel, the Court should however scrutinise all the circumstances which induced the concurrence or acquiescence, *Burrow v. Walls*, 5 De G.M. & G. 283, and the other English cases, cited above.

Power of Court to check breach of trust by executor pending administration:—When administration is still alive, the Court can check the diversion and misapplication of the trust fund by the trustee by taking an interlocutory proceeding and by calling upon the executor therein to bring back into Court all moneys in his hand or deflected by him and to furnish security for the same, *Gobardandas v. Gopaldas*, 60 Cal. 30 = A.I.R. 1933 Cal. 268 = 149 I.C. 749.

369. [Pro. S. 147 & Suc. S. 328] When an executor or ad-

ministrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Illustrations.

(i) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.

(ii) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

Liability for neglect to collect assets:—This section provides for the liability of the executor for losses caused by his omission, just as the preceding section provided for his liability in case of losses arising from his acts. We have partly dealt with the effects of his negligence at p. 681, *supra*, under "Devastavit" which please see. If he neglects to collect the assets, and if they are lost to the estate in consequence, he will be bound to make them good, *Khusrulai v. Hormuza*, 17 Bom. 637; see also *Bilee Solomon v. Abdul Aziz*, 6 Cal. 687. So he should not, without good reason, allow money to remain on personal security for an unnecessarily long time, see *Powell v. Evans* and *Lowson v. Copeland* and other cases cited under the last section, at p. 685; the executor will be liable if he allows a debt

to become barred, by his delay in bringing an action on it, *Haywood v. Kinsey*, 12 Mad. 573. Similarly, neglect to recover possession of a property allowing the cause of action to be barred by time, renders the executor liable under this section, *Keshoprosad v. Madhoprosad*, 3 Pat 880 (912). If the executor allows money to remain in a Bank for more than a year since the testator's death, and the Bank fails, he will be liable, *Moyle v. Mylne*, 3 Russ. My. 710; Cf *Lincoln v. Wright*, 4 Beav. 427. It is no answer to a charge of neglect against the executor to say that the beneficiaries did not give him any reminder, nor did they call upon him to realise the assets, *Re Birch*, 27 Ch. D. 622; vide also Williams, 11th Ed p. 1636. No liability arises under this section if the loss does not result from the executor's neglect but from some casualty, over which the executor has no control (e.g. fire, earthquake and so forth) *Jones v. Lewis*, 2 Ves. Sen. 240; *Fry v. Fry*, 27 Beav. 146; there is no obligation on the part of the executor to insure against fire, *Re Fowler*, 16 O.D. 728. No action lies for not taking out probate, although such neglect is followed by loss, *Re Stetens*, (1898) 1 Ch. 162.

Slight neglects to be condoned:—Otherwise no one should come forward to undertake the thankless task of an executor, vide notes at p. 684, ante. Vide also *Marsden v. Kent*, 1 R. 5. Ch. D. 598. There is no liability except in cases of gross neglect, *Selby v. Bowie* 11 W.R. (Eng.) 669; *Clifford v. Lansdowne*, (1909) 2 Ch. 707. There is also no liability where the executor acts with *übermæ fidei*, and is but misled by the language of the will, *Hogg v. Green-Hay*, 3 Hyde, 3. Though there is no escape from liability on the ground that the executor acted under a wrong legal advice (vide at p. 684 ante), still where the beneficiaries receive wrong legal advice and authorise the executor to act on the strength thereof, there is no liability of the executor, *Adesir v. Manchershaw*, 12 Bom. L.R. 53.

Appointment of Receiver upon removal of Executor:—While administration is being made through Court, if the executor is found to be guilty of gross misconduct, the Court will remove him and appoint a receiver in his place, *Hafizabai v. Kazi Abdul*, 19 Com. 83. But a receiver should not be appointed on slight grounds, *Middleton v. Dodswell*, 13 Ves. 226; *Ex parte Walker*, 25 Ala. 81. The object of appointment of a receiver is to protect the property from future injury, see *Dougherty v. McDonald*, 10 G.A. 121.

Recoupment of Administrator:—Where it is necessary to re-imburse an administrator for his expenses, an order of the Court should be obtained, *Chandra Kanta v. Bhagwan*, 1 I.C. 526 (Cal.).

PART X.

SUCCESSION CERTIFICATE.

370. [Suc. Cert. S. 1 (4)] (1) A succession certificate (herein-after in this Part referred to as a certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate :

[N.C.A. S. 5] Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

(2) [Suc. Cert., S. 3 (2)] For the purposes of this Part, "security" means—

- (a) any promissory note, debenture, stock or other security of the Central Government or of a State Government;
- (b) any bond, debenture, or annuity charged by Act of Parliament of the United Kingdom on the revenues of India;
- (c) any stock or debenture of, or share in, a company or other incorporated institution;
- (d) any debenture or other security for money issued by, or on behalf of, a local authority;
- (e) any other security which the State Government may, by notification in the Official Gazette, declare to be a security for the purposes of this Part.

General Notes: This section is based on sec. 1 (4) of the Succession Certificate Act, with the exception in the proviso which is based on sec. 6 of Act VII of 1901. The effect of the section here reproduced is apparently that succession certificate cannot be granted in a case where the law requires probate or letters of administration to establish a representative title before the Court. In cases where letters of administration or probate are not essential, i.e., cases falling within the Act of 1881, a certificate can apparently be granted. The section is

based on this view of the law"—*Notes on Clauses of the Original Bill*. It is not in the contemplation of any of the sections of this Part X that there could be an enquiry in one proceeding as to which of the three deceased persons was entitled to the deposit, *Mt. Kabo v. Damrilal*, A.I.R. 1955 Pat. 478. A succession certificate can be given only in respect of an estate of a deceased person which goes to his heirs; it cannot be given in respect of the property of the deceased person which is to go out to particular persons who are not necessarily the heirs of the deceased, *Hanafibai v. Karachi Port Trust*, 23 S.L.R. 359—A.I.R. 1929 Sind. 177—117 I.C. 151. There is no question of such a certificate where the property goes by survivorship and not by succession Cf. *Ranji Dass v. Firm Mangal sen*, I.L.B. (1958) Patiala 809—A.I.R. 1954 Pepsu, 66.

Restriction on grant of Succession Certificate:—A certificate shall not be granted in those cases where probate or letters of administration are necessary, *vide* secs 2:2 and 218, *ante*, and the notes thereunder. Cf. *Ramsaran v. Gopali Ram*, 71 P.W.R. 1916 : 88 I.C. 603. No, it has been held that where the deceased person has left a validly executed will, all the estate of that person vests in the executor and no succession certificate can be granted in respect of any part of that estate, the prohibition of this section standing in the way, *Kiran Gopal v. Chunnilal*, 20 N.L.J. 272—A.I.R. 1938 Nag 47—172 I.C. 872. Special attention is drawn to sub-sec. (2) of each of those two sections showing the extent of their application. Those Hindus, Buddhists etc., to whom sec. 67 does not apply are exempted from sec 218; and consequently, in the case of such persons, though there is a will, and though probate or administration *cum testamento annexo* might be taken, a certificate may be granted hereunder, *Rattan Singh v. Chaudhuri*, 2 Lah L.J. 578 : 68 I.C. 302; *Jamna v. Doulat*, 2 A.L.J. 126; *Achutam v. Cheriotti*, 22 Mad. 9 (10); *Kalidas v. Baimahal*, 16 Bom. 712; *Dote Liladhar v. Bai Parvati*, 18 Bom. 108; *Junki v. Kalu Mal*, 6 A.L.J. 171; *Ram Chandra v. Lakshman*, 189d P.J. 499; *Thammayappa v. Nanjappa*, 1 Mys. L.J. 42; *Bhagavan v. Bachar*, 6 Bom. 73. A grant under sec 218 is necessary only for the "executor" or the "legatee," and not for the legal heir (*vide* notes at p 376, *ante*); therefore the heir of the testator, if he does not claim as a legatee under the will, may apply for a certificate under this section, *Sameh v. Kamini*, 89 I.C. 626 (Cal.). Cf. *Basanta Kumar v. Gopal*, cited at p 376, *ante*. If he claims under a will, the will will have to be first probated, *Kesar Singh v. Sm. Tej Kaur*, A.I.R. 1961 Punj 609—also read A.I.R. 1927 Mad. 1054 (F.B.); A.I.R. 1955 Pat. 126. Where probate or letters of administration have already been obtained, no succession certificate is necessary, *Rama ugrah v. Chunnilal*, 27 I.C. 822. The Preamble of the Act talking of "succession" and making provision for the legal representation of the deceased's estate will naturally be inapplicable to cases of survivorship, see *Banwari Lal v. Maksudan Lal*, 1930 A.L.J. 280—A.I.B. 1930 All. 99—122 I.C. 183, and read the notes under the headings, "Pass by survivorship" and "Joint Hindu Family," respectively at pp. 370, and 411, *ante*. But from that it does not

necessarily follow that the converse proposition will hold good; so when the persons who are really survivors, choose to call themselves only successors or legal representatives and on that footing ask for a succession certificate, the Court should not propose to restrict their such claim or to dismiss their application. The claimants may very well say that they represent the deceased person's estate and on that right they should be allowed to collect the debts with the help of a certificate, *Banwari Lal v Maksudan Lal, supra*. It is well known and if there is a *prima facie* outlook of representation, the Court will not deeply go into the question of the basic foundation of title, read the notes and cases at p. 678, *ante*, and under sec. 378, *post*. So, where the widow asked for a grant on the allegation that the property in question was her husband's separate property, the Court would make a grant without scrutinising whether the property was really separate property or joint property subject to the rule of Survivorship, *Raghunath Misra v. Pate Kier*, 6 C.W.N. 345, cited at pp. 406, 408, *ante*. As to when this section rather than sec. 250 of the Act will apply, see *Ghanshyamdas Somnani, In re*, I.L.R. (1946) 1 Cal. 92.

Construction:—The statute relating to succession certificate is partially a fiscal enactment and it is to be administered as far as possibly leniently and must be construed in favour of the subject, *Bhudat Singh v. Mangat Rai*, 1984 A.L.J. 579 = A.I.R. 1984 All. 296 = 147 I.C. 1168

Proviso to sub-sec. (1):—This is section 5 of the repealed Native Christians Administration of Estates Act (VII of 1901). It has the effect of over-riding the decision in *Re Joseph Vathar*, 7 M.H.C.R. 121, wherein it was held that a Native Christian could not apply for a certificate of heirship. Sec. 212 (which contemplates the case of intestacy) does not apply to a Native Christian; therefore where there is no will, a Native Christian can apply for a certificate hereunder, Cf. *Ponusami v. Dorasami*, 2 Mad 209. As regards sec. 213, it being limited to an executor or a legatee, a legal heir, if not claiming under the will, can obtain a certificate hereunder.

Parsis:—They have been held to be subject to secs. 212 and 213, and therefore fall within the restriction of this section, *Mirza Kurrutalain v. Nuzhat-ud-dowla*, 33 Cal. 116 : 1 C.L.J. 594 : 9 C.W.N. 938 : 7 Bom. L.R. 875, P.C. The position is different now. Vide also at p. 974 under the heading "Parsis."

Sub-sec. (2): Security:—This sub-section defines what the word "security" in sub-sec. (1) means. It will be seen that Insurance policy is not herein contemplated, *Charusella v. Jyotish*, 38 I.C. 157 (Cal.) cited at p. 894, *ante*. Vide also the other cases cited there. A fixed deposit in a bank is not a security within the meaning of this sub-section, *Gulraji v. Jagdeo*, 28 All 477 : 1906 A.W.N. 94; also *Hopkins v. Abbot*, L.R. 19 Eq. 222. A mortgage is not a security within the mean-

ing of this section, *Ramu Singh v. Aghori Singh*, A.I.R. 1918 Pat 68 = 173 I.C. 487. The entire holding of a person in a company is to be taken as one security, *Re Debran Debi*, 24 Pat. 100 = A.I.R. 1945 Pat 818. Ornaments pledged for debts are not securities, *Shyama Sundari v. Sartti Debi*, A.I.R. 1962 Pat. 220.

Court-fees.—Read the notes under a similar heading, at p. 696 *post*.

371. [Suc. Cert. S. 5] The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

N.B.—"In this clause and the rest of this Part, the words "District Judge", have been used in order to assimilate this Part to the rest of the Bill"—
Notes on Clauses of the Original Bill.

Which Court to grant certificate—The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death or if at that time he had no fixed place of residence, then the District Judge within whose jurisdiction the deceased left property, will have power to grant a certificate hereunder, *Gopil Lalji v. Juddo*, 1886 A.W.N. 39. Place of death has got nothing to do with the question of such jurisdiction, *Shiva Kumar v. Bhanu Lalash*, 1862 M.P.L.J. (notes) 113. Jurisdiction of Court is primarily determined by residence. It is only when residence is indeterminable that the alternative provision for determination of jurisdiction by situation of the property applies, *Chen Iyu v. Chen Chor*, 2 B.M.L.J. 2 A.I.R. 1923 Rang 288 = 75 I.C. 235. Therefore, where a person had no fixed place of residence which means that he had "no fixed place of residence in India," the Judge of the district in which his debts are, has jurisdiction to grant a certificate, *Gelam v. Mahomed*, 20 W.R. 266; *Amar Singh v. Sham Singh* 37 P.L.R. 502 = A.I.R. 1945 Lab 846 = 160 I.C. 681. The words "resided" and "residence" occurring in the section must receive the same interpretation in the absence of anything to the contrary; when the section refers to the deceased having no fixed place of residence, it must also refer to residence in British India. *Krishnammal v. Lakshmi Ammal*, (1949) 2 M.L.J. 647 = 1949 M.W.N. 711 = 69 L.W. 847—relying on *Amar Singh v. Sham Singh, supra*. This Part only contemplates the issue of a certificate only with respect to a British subject either resident within the district in question, or else having no fixed residence but leaving property in such district. In the absence of fixed place of residence, jurisdiction has to be determined with reference to the situation of the deceased's property, *Krishnammal v. Lakshmi Ammal, supra*. Read also the notes under the heading, "Property", below. There is no

provision herein for the administration of the effects of a foreigner domiciled abroad, (e.g. a *Sirdar* of Baroda, who resided and died at Baroda), *Ibrahim Ali v. Ziaulnissa*, 12 Bom. 160 (a case under Act XXVII of 1860). The observation of West J. in this case has been considered to be an obiter in *Krishnammal v. Lakshmi Ammal, supra*. For the effect of a certificate granted to a resident within a Foreign State by the British representative in that Foreign State, see sec. 882, *infra*. Where the deceased had his ordinary residence in a district, and did his business there, the Judge of that district will have jurisdiction to grant a certificate under this Part, *Ramsaran v. Gappu Ram*, 71 P.W.R. 1916 : 88 I.C. 608. In Sonthal Perganas, the Deputy Commissioner has the power of District Judge, *Kaliprosad v. Mothur Chandra* 4 Cal. 222; In Chota Nagpur the Judicial Commissioner can act as the District Judge, *Joynarayan v. Mudhoo Sudun*, 16 Cal 13.

District Judge :—*Vide* notes at pp 9, 848 and 501, *ante*. The expression as defined in sec 2 (bb) makes it clear that now (i.e. since 1st Oct. 1929) an application for a succession certificate can be made to the High Court on the Original Side, see 34 C.W.N. xcix (99); *Satyalala v. Sudharanee, Re Bhulanath Pal*, 58 Cal 801 = 35 C.W.N. 122 = A.I.R. 1931 Cal 580 = 134 I.C. 1279; *Re Aranya Chellum*, 9 Rang. 205 = A.I.R. 1931 Rang. 281 = 135 I.C. 80. Of *Kedernath v. Govardhan*, 12 C.W.N. 446, *Re Kuppusami Nayar* 53 Mad. 287 = 59 M.L.J. 17 = A.I.R. 1930 Mad. 779 = 126 I.C. 481. The Nagpur High Court has no Original Side as the High Courts in the Presidency towns have, and therefore it does not fall within the definition of "District Judge" in sec. 2 (bb) of the Act and cannot entertain an application for a succession certificate, *Vishnu Muhibdar, In re*, I.L.R. (1945) Nag 148 = 1944 N.L.J. 264. That is the position also with the Allahabad High Court and a Judge thereof is not the Judge of a civil Court of original jurisdiction so as to be competent to grant a succession certificate as a District Judge is, *Rajendra Chandra Sengupta, In re* 57 All. 802 = 1934 A.L.J. 800 = A.I.R. 1934 All. 958 = 152 I.C. 825. For the position of the Patna High Court, read *S.K. Ray, In re*, 27 Pat. 18 = &c, cited at p 9, *ante*. "District Judge" includes an Additional District Judge, *Iftakharnuddin v. Asha Bai*, A.I.R. 1956 Bhopal, 69 — ref. to 1954 H.C. 340 = 1954 S.C.J. 514.

Ordinarily resided :—*Vide* under the heading "Fixed place of abode" at p 514. Cf. *Ramswarin v. Gappu Ram, supra*. Read *Krishna Ammal v. Lakshmi Ammal*, (1949) 2 M.L.J. 647, *supra*.

Property :—As to the importance of the location of the property as a determining factor of the question of the jurisdiction of Court, read the notes under the heading, "Which Court to grant certificate," above. Note that the term "property" is used in a general sense. *Vide* notes at p 514, *ante*. Of course, it will include the debt for which certificate is taken, *Gulam v. Makened, supra*. In

Mahabir v. Lala Baldeo, 1 I.C. 205, the word *property* (though used in a general sense) seems to have been taken as being restricted to debts only. It is difficult to follow why a general word should be given a restricted meaning. *Oj. Javani v. Golam Hossein*, 47 I.C. 771. The material point of time at which property once owned by the deceased should be found within jurisdiction, is the date of the application for certificate and not the date of his death, *Krishnammal v. Lakshmi Ammal*, (1949) 2 M.L.J. 647—1949 M.W.N. 711—62 L.W. 847. Where Government securities belonging to the deceased have been registered in the Reserve Bank of India (Public Debt Office), Madras, the Madras High Court will have jurisdiction to deal with them, and not the other High Courts, although the Reserve Bank has branches within the jurisdiction of those other High Courts *Ibid.*

No other Court can question District Judge's Jurisdiction:—When the District Judge assumes jurisdiction under this section and grants a certificate, his authority cannot be questioned by any other Court before which the certificate is filed; to hold otherwise would be to open the door to confusion and give opportunity for fraud, *Durga Das v. Gullu*, 27 All. 87 : 1904 A.W.N. 172. *Vide* notes under sec. 381; also *Golam v. Tasaydak*, 28 O.W.N. 289 : 46 I.O. 890.

372. [Suc. Cert. S. 6] (1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:—

- (a) the time of the death of the deceased;
- (b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;
- (c) the family or other near relatives of the deceased and their respective residences;
- (d) the right in which the petitioner claims;
- (e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted; and

- (f) the debts and securities in respect of which the certificate is applied for.
- (2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof.*

Application for Certificate —(1) It shall be made to the District Judge, and (2) shall be signed and verified like a plaint and (3) shall set forth the particulars mentioned in clauses (a) to (f). Compare this section with secs 276 and 278. An applicant for certificate should conform to the requirements of this section with a certain degree of strictness. *Sukumar Deb Roy v. Parbatlala*, 1 L.R. (1941) 2 Cal 311—A.I.R. 1941 Cal 668=198 I.C. 471. This however does not mean that a defective petition should be dismissed straight away without any opportunity being given for rectification of the defects by an amendment. *Ibid*. In drawing up an application for the grant of a succession certificate, the provisions of this section should be strictly adhered to and the particulars mentioned in the various clauses of the section should be specified in the application with meticulous care. Special attention should be bestowed on the requirement of clause (e) in particular; remember always that under sec 870 of the Act, no succession certificate can be granted in respect of a debt or a security for which a grant has to be taken by reason of sec 212 or 213, *ante*. As to the form of such an application, *vide* Model Form No. 9, appended to the Book

Signed and verified:—*Vide* notes at pp 533-34, *ante*. For the effect of want of verification, see at p 534, *ante*. Penalty for false averment is provided in sub-sec. (2), *supra*. Compare also the notes at p 535. The person verifying should state what paragraphs he verifies of his own knowledge and what paragraphs he verifies on his information, which he believes to be true. *Re Uzendralal*, 6 Cal 676.

Scope of Enquiry:—Read *Mt Chaya v. Dinanath*, 89 P.L.R. 448=A.I.R. 1937 Lab 196=172 I.C. 660; also the notes under the heading, "Nature of Enquiry in summary", about 3 pages below.

Certificate for some only of the Debts:—There is nothing in law to prevent the Court from granting a certificate in respect of some only of the several debts

* Sub-section (3) has been added by the Indian Succession (Amendment) Act, XIV of 1898, which is in force from 22nd September, 1898.

due to the deceased. So an applicant is at liberty to ask for a certificate in respect of only those debts which he wishes to collect for the time being, and the Court cannot compel him to include other debts in his petition, *Re Indarman*, 18 All. 45 : 1895 A.W.N. 152; *Sundarammal v. Kullapa*. 5 M.L.J. 36. Cf see, 376. No certificate is necessary for recovery of unpartitioned deposit money belonging to a joint Hindu family, *Jagannath v. Ram Dularay*. I.L.R. (1916) 1 All 156—A.I.R. 1956 All. 68.

Court-fees on application :—The application is chargeable with a Court fee of -/12/- as under Sch II, Art 1, Cl. (b), para 2, of the Court Fees Act in all the Provinces, excepting in Bombay where it is chargeable with a special fee under Sch. II, Art. 18 as amended in 1922. For the exemption of persons subject to the Indian Army Act to pay Court-fees, *vide* the general notification of exemption under sec. 95 of the Court Fees Act, 1870. Under the C.P. Court-fees (Amendment) Act of 1935, (Sch I, Art 12), if no single item of debt in an application for a succession certificate exceeds Rs. 1000/- no Court-fees will be payable in respect of it, although the total aggregate amount of all the debts exceeds that amount. *Fremalalai v. Priya Kumari*, 1940 N.L.J. 495—A.I.R. 1940 Nag. 400 See also 48 Bom. L.R. 498.

Certificate to Minor :—There is no prohibition in the Act against the grant of a certificate to a minor. But if a certificate is granted to the minor, difficulty may arise by reason of the fact that no responsibility can be fixed on him for his acts, nor can such responsibility be shifted on to his guardian or next friend; see *Trevelyan's Minors*, 4th Ed. p 36. So, conflicting views have been taken with respect to this question. According to one opinion a certificate can be granted to a minor through his next friend, *Ram Kuwar v. Sardar Singh*, 20 All. 352; *Kalikumar v. Tara Prosunno*, 5 C.L.R. 517; *Mst. Omrao v. Syad Aga Meer*, 12 W.B. 119, *Re U V. Nayagan*. A.I.R. 1936 Mad. 406. If a certificate could not be granted to a minor, the result would be that sec. 214 would debar him from realising the debts which he becomes entitled to by succession. *Singanamalu Krishnamacharlu v. Singanamala Venkatarama*, 36 Mad 214 : (1912) M.W.N. 411 : 15 I.C. 408. To obviate this absurdity, the Madras High Court has conceded the right of a minor to a certificate, and has at the same time, recommended the taking of security from the guardian to guard against the consequences of want of responsibility on the part of the minor, *Ibid*; see also *Periah v. Lakshmidevi*, 16 I.C. 797. But the Judicial Commissioner of Sindb following a decision of the Bombay High Court has held that a minor cannot apply for a certificate through a next friend, *Re Danbxi*, 4 S.L.R. 266 ; 10 I.C. 981. But the Bombay High Court holds, on a construction of sec 27 of the Guardians and Wards Act, that a certificate can directly be granted to the minor's guardian who is appointed under the said Act, *Exparts Mahadev*, 98 Bom., 84 : 6 Bom. L.R. 281. Against this view it may be contended that this section contemplates an application only

by a person who claims the right for himself. Cf *Gulab Chand v. Moti*, 25 Bom. 523 : 8 Bom. L.R. 795 (distinguished in 28 Bom. 844, *supra* which characterises the observation of Ranade, J. as an *obiter dictum*). In a subsequent case the Bombay Court has said that the certificate can be granted only when the guardian has been appointed guardian of the property of the minor under the Guardians and Wards Act. The form of the certificate should not be in favour of the minor but in favour of the certificated guardian who should be empowered to recover, transfer or negotiate or otherwise deal with the securities in question for the use and benefit of the minor and to pass valid receipts on his behalf, *Narayan Khanderao, In re*, 36 Bom. L.R. 950 = A.I.R. 1938 Bom. 436 = 145 I.C. 688. Any how, when a certificate is granted to a minor through his next friend or guardian, certain conditions should be imposed, (such as furnishing of suitable security and so forth) in order to safeguard the interests of the minor grantee, *Re Sunder Das and Jamna Das*, 22 S.L.R. 206 = A.I.R. 1927 Sind. 187 = 101 I.C. 166. The Rangoon Court has expressed the view that the Court has no power to require the next friend of the minor to execute a bond required by sec. 875, *Re C. V. Nayagan*, A.I.R. 1936 Rang 466.

Q1 (b):—The jurisdiction conferred by sec 5 on the District Judge is not enlarged by this section, *Chan Iyu v Chan Chor*, 2 Bur. L.J. 42 ; A.I.R. 1928 Beng. 218 : 75 I.C. 245. Notice that the section contemplates a succession certificate only in relation to the property of a deceased person and not in relation to a property which the applicant claims as his own property. *Muthura Prasad v. Shriwan*, I.L.R. (1943) All. 690 = 1943 A.L.J. 372 = A.I.R. 1943 All. 803 = 209 I.C. 164 Cf. A.I.R. 1954 Pepsu, 66, cited at p 610, ante

Q1 (d): Who can apply.—The right in which the petitioner claims must be set forth in the application, and will be decided by the Court. *Asgarneza v. Abdul*, 15 Cal. 574 (585). Any person claiming a right in the debts or securities can apply, or, in other words, in order to be entitled to a succession certificate, the applicant must have a beneficial interest in the debt or security to be collected, *Re C. V. Nayagan*, A.I.R. 1936 Rang 466. The guardian of a minor interested in the money may apply, *Ex parte Mahadev*, 28 Bom. 844 : 6 Bom. L.R. 281. Neither the deceased's sister's daughter, nor the son of such daughter, who are no heirs in Bengal, can apply for a certificate, *Krishnapada v. Secretary of the State*, 85 Cal. 681 : 7 C.L.J. 555 : 12 C.W.N. 453. The section is wide enough so as to include applications by creditors, as well as by heirs of a deceased person—*cide the speech of Sir Andrew Seobie, Law Member, Gazette of India, Part VI, March 16, 1869, Assignee of Heir*, p. 48. The assignees of a debt from the heir of the deceased can apply hereunder, *Gulsham Ali v. Zakir Ali*, 42 All 549 : 18 A.L.J. 686 : 57 I.C. 55,—relied on in *Krishnammal v. Lakshmi Ammal*, (1948) 2 M.L.J. 647 = (1948) M.W.N. 711. There is no reason why a succession certificate should not be granted to the assignee of an heir. *Ram Chariter v. Ram*

Narain, 2 P.L.J. 350 : 40 I.C. 96; *Vairakan v. Srinivasa*, 41 Mad. 499 : 40 M.L.J. 481 : 62 I.C. 944 (F.B.); followed in *Krishnammal v. Lashmi Ammal, supra*, which has held that such an assignee is not only entitled to apply, but is also bound to apply. Comp. also 15 Mad 419. Vide notes and cases at pp. 397-98, ante. A certificate hereunder may be granted to a donee succeeding under sec. 191 of the Act to a *donatio mortis causa*, *Dolly Edelwars v. Mallakin*, I.L.R. (1943) All. 198 - 1942 A.L.J. 781 - A.I.R. 1943 All. 96 - 205 I.C. 381.

Cl. (e): Impediment to Certificate:--As a certificate cannot be granted where Probate or Letters of Administration are necessary (sec. 370), this clause obliges the applicant to state the absence of such impediments. The existence of a will not falling within the mischief of sec. 218, is not such impediment, *Thammayyappa v. Nanjappa*, 1 Mys. L.J. 42; *Ramuthi v. Padmanathan Chetty*, 1932 M.W.N. 872 - 85 L.W. 261 - A.I.R. 1932 Mad. 801 - 198 I.C. 494. As to whether the registration of a will will operate as a notice of its existence, vide *Vithal v. Mohanlal*, 46 Bom. 170; 22 Bom. L.R. 1158: 59 I.C. 608. But compare *Tilakdhari v. Khedan Lal*, 47 I.A. 239 - 48 Cal., 1: 32 C.L.J. 479 : 25 C.W.N. 49 (P.C.); *Hetram v. Shadiram*, Subsequent application 40 All. 407 (410) P.C. A subsequent application for letters for letters is no impediment of administration will not justify the rejection of an application for certificate hereunder, *Ram Saran v. Gappu*, 71 P.W.R. 1916: 83 I.C. 603. Payment of some compensation money payable under Bihar Land Reforms Act to a wrong party is no impediment of succession certificate being granted to the right party entitled, *Ramji Rao v. Jageshwari*, A.I.R. 1964 Pat 272.

Cl. (f):--The petition must specify each debt and security for which the application is made, *Maung Tha v. Maung Hla*, 8 Bur. L.T. 168 : 8 I.C. 993. Cf. *Rahidca v. Jadeo*, 20 W.R. 412, but not the debts or securities not intended to be immediately collected (see sec. 376), *Sundarammal v. Kullappa*, 5 M.L.J. 86. Cf. 18 All. 45, *supra* 'Debt' here means the whole debt and not a portion of it, *Ghafoor Khan v. Kalandari*, 39 All. 827 : 8 A.L.J. 79 ; 9 I.C. 127 (F.B.). Vide notes at pp. 348-95, ante.

Notice to Debtors of the deceased:--As seen under the last heading, the application for a succession certificate should contain the particulars of the debts and securities intended to be immediately collected on the strength of such certificate; but it is not necessary to issue notices of the application to the debtors or other persons liable for them. If any notice is however (though unusual) is issued to those debtors or other persons, that would not necessarily vitiate the proceedings on that account, *Mt Charyo v. Dinanath*, 39 P.L.R. 448 - A.I.R. 1937 Lab. 196 - 172 I.C. 660.

Limitation:--There is no time-limit for applying for a certificate. Art. 181 of the Limitation Act does not govern such an application, *Pulastman e v.*

Anundmoyi, 8 W.R. 898; *Durgadass v. Jadunath*, 2 B.L.R. 26; *Janki v. Keshotalu*, 8 Mad. 207; *Ch. Abinash v. Probodh*, 15 C.W.N. 1018; *Bai Manek v. Manakji*, 7 Bom. 218; *Kas Chunder v. Gopi Krishna*, 19 Cal. 48; *Gnana Muthur v. Vana Koil*, 17 Mad. 879; *Hafizuddin v. Abdool*, 20 Cal. 755. But when the application is made long (say, 40 years) after the death of the deceased, a natural presumption may arise that all his debts are time-barred, and in such a case lapse of time may justify a refusal of the application by the Court. *Kunja Behari v. Grees Chandra*, 6 Cal. 616; *Wooma Tara v. Kalsara*, 26 W.R. 98; but see *Durgadass v. Jadunath*, 2 B.L.R. 89 26.

Second Application.—Dismissal of a previous application on the ground of insufficiency of security, is no ground for refusing a second application, *Poorna v. Chunilal*, 14 A.L.J. 664 : 85 I.C. 718. *Vide* also under the heading "Res judicata" at p. 400, ante.

Sub-sec. (3).—This new sub-section sets at rest the conflict of judicial opinions regarding the question as to whether a certificate can be granted in respect of a portion of a debt, *vide* the notes at p. 395, ante. The amendment accepts the Calcutta view expressed in *Annapurna v. Nalini Mohan*, (42 Cal. 10) cited at p. 395, ante.

373. [Suc. Cert. S. 7] (1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

- (a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and
- (b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to him to

be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

Procedure:—This section lays down the procedure the District Judge is to follow when an application for certificate is presented to him. It says that if the Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing of the application and shall issue special and general notices, and on the appointed day shall summarily determine the right of the applicant to the certificate and shall or shall not direct its issue accordingly. Sub sections (3) and (4) provide the procedure for the cases involving intricate questions of law and fact and the cases of conflicting claims. Cf. *Basanta v. Parlane*, 51 Cal., 188 : 8 C W N. 61. The Court cannot dispose of the case without making some enquiry as to the right of the claimant, *Hari Krishna v. Balabhadra*, 23 Cal., 431. Even when the issue between the parties involves a question of *status* the Judge should proceed to some decision (though of a summary character) *Dharmaya v. Sayana*, 21 Bom. 63; *Balmukund v. Kundan*, 27 All., 452 2 A L.J. 144.

District Judge:— Read the notes at p 693, ante.

Nature of Enquiry is Summary:—Before the certificate is granted, the Court must decide (though in a summary manner) the applicant's right to it, *vide Hari Krishna v. Balabhadra*, 23 Cal 431; *Ramsearan v. Gapu Ram*, 71 P.W.R. 1916 : 83 I.C. 603; *Re Parvammal* 70 Mad L.W. 907. All questions arising under this Part must be determined in a summary manner, that is, without any elaborate investigation as in a regular suit *Gulachand v. Mots*, 25 Bom 523 : 8 Bom, L.R. 795, *Bai Kashi v. Prabhu*, 28 Bom L.R. 119; so, it has been said that a proceeding under this Part is of a summary nature in which the Court merely decides the right to the Certificate and does not determine the share of the applicant in the debt. *Ghafoor Khan v. Kalandari*, 33 All 327 : 8 A.L.J. 79 : 9 I.C. 127; nor does it decide any question which may necessitate the construing of the will, and any adjudication as to the relative rights of the parties concerned *Akbul Gofur v. Jaywabi*, 31 Bom L.R. 1093 = A.I.R. 1929 Bom. 456 = 122 I.C. 888. If in the course of bearing the application any intricate and difficult question of law or fact arises for determination, the Court, instead of making a final pronouncement on the same, would do well to grant the certificate to the person who appears

to it to have *prima facie* the best title thereto and to make collection of the debts just to evade the bar of time, *Mt. Charjo v. Dinanath*, 39 P.L.R. 448 = A.I.R. 1937 Lah 196 = 172 I.C. 660. The question of re-union is not suitable for enquiry in such a summary proceeding, *Jagannath v. Kuadari*, (1917) Pat 264 : 48 I.C. 126. Compare also *Radharani v. Brindaban*, 25 Cal. 8.0 ; *Dharmaya v. Sayana*, 21 Bom. 58 ; *Jigri Begum v. Syed Ali*, 5 C.W.N. 494. In a summary proceeding under this Part the Court has only to see that a *prima facie* right to collect the debts is made out and the Court's order does not bar the trial of the same question in a suit between the parties *inter se*, *Rattan Singh v. Raj Singh*, 2 Lah L.J. 678 : 68 I.C. 802. Cf. *Chunnilar v. Gulab Chand*, 14 O.C. 53 : 8 I.C. 780. The *prima facie* title ought to prevail without the decision upon the intricate question of law or fact, *Sivamma v. Subamma*, 17 Mad. 477 ; *Angappa Chettiar v. Meenakshi*, 24 M.L.J. 198 : (1918) M.W.N. 176 : 18 I.C. 788. Therefore, no issue need be framed on such intricate questions, 8 I.C. 780 (*supra*). The Judge should decide the right to the certificate, *vide* sub-sec. (2); see 28 Cal 481 (*supra*a). In a proceeding hereunder the Court not being concerned with the question of title, can proceed to prefer the nominee of a subscriber to a provident fund as against the natural heirs of the deceased subscriber, *Ekbal Ahmed v. Mahomed Mahsood*, 79 C.L.J. 152.

When title of rival claimants depends on a question of fact Right.

that question must be gone into even before the *prima facie* preferential claim of any party to the certificate is determined, *Astgar Rezu v. Abdul*, 16 Cal. 674. Cf. *Nimed v. Bas Uyal*, 1886 P.J. 100. Though the character of the enquiry is summary, still that does not entitle the judge to dispense with the judicial determination of an indispensable question of title, *Balmukund v. Kundan*, 27 All 462 (*supra*). Cf. *Saraswati v. Subbier*, (1914) M.W.N. 24 : 21 I.C. 867 or to dismiss the application on the ground that the questions involved are far too complicated for the purposes of a summary proceeding, *Lakshminarayan Chettiar v. Seshama*, I.L.R. (1943) Mad 280 = (1942) 2 M.L.J. 562 = (1942) M.W.N. 620 = A.I.R. 1942 Mad 709 = 20 I.C. 264. So, when in answer to an application for a certificate, an oral will is set up, it will be necessary Question of will.

for the Court to decide the issue as to the existence of the will, *Janki v. Kallu Mal*, 31 All 286 : 6 A.L.J. 171 : 2 I.C. 218 ; *Saraswati v. Subbier*, *supra* ; *Koyali v. Koyaman*, 31 I.C. 446 ; *Mirza v. Syed Nader*, 3 B.L.R. 46 (A.C.) : 11 W.R. 398 ; *Kalidas v. Bai Mahals*, 16 Bom 712.

Enquiry as to the existence of Debt—The section requires the Judge to decide in a summary manner the right to the certificate. It does not contemplate any enquiry into the existence or non-existence of a debt, *Srinivas Chariar v. Gopalan*, 26 M.L.J. 866 : (1914) M.W.N. 828 ; 28 I.C. 424 ; *Bai Kashe v. Parbhoo*, 28 Bom. 119 : 5 Bom. L.R. 721. So, it is not necessary for the Judge to determine whether the alleged debt is really due to the deceased's estate, *Andalammal v. Venkata Chariar*, 17 M.L.J. 267 ; Cf. *Re Kalenath*, 8 W.R. 12 ; *Phagolatty v. Bholanath*, 8 W.R. 817 ; *Sarat Chandra v. Thakoremusses*, 9 W.R. 240 ; *Re Bama*

Ka'es, 10 W.R. 4; *Wassun Huq v Gowkuroonissa*, 10 W.R. 105; *Zumootoon v. Khutoo*, 12 W.R. 239; *Fuzl Moula v. Golam Shurrap*, 12 W.R. 605; *Radhika Charan v. Jadunath*, 20 W.R. 412; *Bishundas v. Mungal Das*, 24 W.R. 203; *Beemul Das v. Shekur Chand*, 24 W.R. 211; *Woomatara v. Kaleetsra, supra*. But it seems that, inasmuch as sec. 872 (f) requires specification of Scope of enquiry. debts &c. and this section requires that the Judge should be satisfied of a proper ground for entertaining the application, the applicant should make out a *prima facie* case about the existence of the debts as belonging to the deceased's estate, *Sukumar Deb Roy v. Parbati Bala*, I.L.R. (1941) 2 Cal. 311-A I.R. 1941 Cal. 663-198 I.O. 471. For this purpose it is not necessary for the Court to decide for itself, as a condition of granting the certificate, that a definite debt is actually owing to the deceased's estate. It is enough if a reasonable and sensible claim is put forward against a third party as debtor of the deceased and that will entitle the Court to assume jurisdiction and entertain the application under this section, *Brojendra Sundar v. Niladri Nath Mukherjee*, 57 Cal 814-50 C.L.J 239-33 C.W.N. 1177-A I.R. 1929 Cal. 661-120 I.C. 241, F.B. The other view which maintained the existence of a debt actually owing to the deceased to be a condition precedent for clothing the Court with jurisdiction hereunder (as taken in *Rudharani v. Brindaban*, 25 Cal. 820-2 C.W.N. 59) now stands overruled by the aforesaid Full Bench case.

Effect of the Certificate:—The certificate serves no other purpose than simply appointing a representative of the deceased's estate for the purpose of collecting debts and giving valid discharge to the debtors of the estate making payments. It does not confer on the certificate holder any right, absolute or even preferential to the money collected and would not bar even a regular suit between the different claimants for adjustment of their rights *inter se*, vide under the next paragraph; also read *Mt. Charjo v. Dinanath*, 39 P.L.R. 448-A.I.R. 1937 Lab. 196-172 I.C. 660.

Res judicata.—*Vide* note at p. 400, *ante*. A decision under this section being of a summary character and being based on *prima facie* evidence, does not generally operate as *res judicata*, see *Kunjbehari v. Gocool*, 3 Cal. 616; Cf. *Re Adija*, 11 I.C. 261; *Jigri Begum v. Syed Ali*, 8 C.W.N. 494. Cf. *Mt. Charjo v. Dinanath, supra*.

Delegation of Judge's power:—The District Judge can not delegate his duty (imposed by this section) to a subordinate judge reserving to himself the passing of the final order, *Raj Kosr v. Rupan*, 142 P.R. 1889.

Sub-sec. (2):—This sub-section obliges the Judge to decide whether or not the applicant has the right to the certificate. As soon as the right to certificate is decided in favour of the applicant, the grant should be made directly and immediately, *Dhunpat v. Government*, 17 W.R. 499.

Sub-sec. (8): Prima facie Title:—The object of this sub-section is not to save the Court the trouble of making an enquiry as to whether the applicant is an heir of the deceased, but is to allow the *prima facie* title to prevail when the case involves too intricate questions of law and fact. *Sivamma v. Subbamma*, 17 Mad. 477. Cf. *Basanti v. Parbati*, *supra*; *Sarawathi v. Subbarao*, *supra*; *Champalal v. Laheri Bai*, 57 I.C. 615; *Sahab v. Ninga*, 15 M.H.C.R. 288; *Ganendra v. Jugmala*, 30 Cal. 581; *Sheetanath v. Promotha*, 6 Cal. 803; *Verkata Krishna v. Narasubhai*, 1954 M.W.N. 625—A.I.R. 1954 Andhra. 23 [N. B.—In this case, the applicant claimed to be a legatee and yet the Court granted him a succession certificate, as there was no impediment under sec. 370]. The intricacy of a case can be judged from the pleadings in the case, *Angappa v. Meenakshi*, 24 M.L.J. 198: (1918) M.W.N. 175: 18 I.C. 783. If the judge commits an error either of fact or of law in considering the question too intricate, the High Court has no power to interfere with his order, *Rama Krishna v. Nagammal*, 10 M.L.T. 164: 11 I.C. 886. Cf. *Mohar Singh v. Reves Kumar*, A.I.R. 1942 Pesh. 42—201 I.C. 841. [If the trial Judge has not considered the question too intricate and has not demanded security for that reason, the High Court will not interfere with that discretion]. When the Court adopts the procedure laid down in this sub-section, he must require security under sec. 375, *infra*, and he has no discretion to dispense with security *Rajam Chetty v. Eadalaiala*, (1912) M.W.N. 585: 11 M.L.T. 384: 14 I.C. 803, Comp. *Lingamma v. Venkryya*, 1944 M.W.N. 207—57 L.W. 220—(1944) 1 M.L.J. 288. An appellate Court has the same discretion under this sub-section as the Court of first instance, *Ram Krishna v. Nagammal*, *supra*.

Duty of Court—Under sub-sec. (2), it is the duty of the Court to decide whether or not the applicant has the right to ask for the certificate and under sub-sec. (8), if the Court finds it difficult to arrive at a proper decision on such right in the summary proceeding, it will be its duty to see which party is *prima facie* entitled to the certificate. Where none of the parties succeed in establishing any *prima facie* claim to the property in suit, the Court will have the discretion to refuse a certificate altogether. If a claimant happens to be in possession of a will in his favour executed by the deceased, that will be a sufficient ground to give him a certificate, *Ramanand v. Parkashanand*, A.I.R. 1939 Pesh. 30—183 I.C. 667.

Sub-sec. (4) Several applicants:—This sub-section lays down the course the Judge should adopt when there are several applicants interested in the estate and says that in such a case the Judge's choice should be guided by the extent of interest and fitness of each applicant. The Judge should select the man with the greatest interest and fitness, and should not permit partial collection of the debt by each of the several applicants, *Shitab Devi v. Deb Prosad*, 16 All 21. Cf. *Shib Devi v. Ajudhya*, 9 I.C. 571. The Patna Court has laid down the following salutary rule for the guidance of the Court when rival claimants appear before it for a certificate. In such a contingency the Judge should select or appoint the

fittest person to whom a single certificate could be granted to collect the whole of the debt on behalf of all the persons entitled to receive it and should take security from such person that he would give the dues to all the other persons entitled to share in the distribution of the money, *Nazmul Haque v. Mt Moulu*, A.I.R. 1934 Pat. 804-149 I.C. 1011. The Bombay Court has said that the Court would view with disfavour the granting of different certificates to different men in respect of different parts of the deceased's property, *Abdul Gafur v. Joyarabi*, 81 Bom. L.R. 1093-A.I.R. 1929 Bom. 456-122 I.C. 883. If separate grants are made to different persons, and they are all acted upon, the appellate Court may be reluctant to set aside the order, *Ibid.* As to grant of joint certificates, vide below. As to comparative degrees of fitness and interest, *vide infra* under the heading "Who is entitled to certificate."

Who is entitled to certificate:—The Court is to select one out of several rival claimants, *Raesunnissa v. Khijoornissa*, 18 W.R. 143, having regard to his interest and fitness, 16 All 21 (*supra*). Propinquity is an ingredient of fitness, *Nunkoo v. Purnendra*, 12 W.R. 866; therefore a full sister's son comes before a half brother, *Lal Mahmud v. Buzool*, 17 W.R. 692. The widow of a separated co-parcener has preferential claim, *Chintaman v. Koenuari*, 18 W.R. 468; *Raghu Pali*, 6 C.W.N. 945; a member of joint family is preferred to one of a separated family, *Ram Golam v. Jankee*, 26 W.R. 31. The husband comes before the cousin of the deceased, *Ead Als v. Wahid Als*, 28 W.R. 25; the mother of an adopted son gets preference over the manager of the estate, *Deenomoyee v. Doorga Pershad*, 3 W.R. Mis. 6. For widowed daughter, see *Chandra v. Rashmoni*, 2. W.R. 24, for widowed daughter-in-law *Meekhun v. Lachmi*, 20 P.R. 1872; for a disciple, preceptor etc., *Gureeb v. Mangul*, 14 W.R. 883, *Dukharam v. Lachmee*, 4 Cal 954; for illegitimate sons *Delcomares v. Gangachar*, 17 W.R. 189; for fitness by reason of propinquity coupled with performance of sradh, see *Hurro v. Rama*, 22 W.R. 274, for persons with large interests, see *Azam v. Amerun*, 12 W.R. 88; a nephew is preferred to son's daughter's son, *Areesuidun v. Jagannath*, 16 W.R. 328; the son of a deceased daughter to a childless widowed daughter, *Pramila v. Chandra Sekhar*, 49 All 460 : 19 A.L.J. 272 : 60 I.C. 771; father's brother's son to father's brother's daughter's son *Gopal v. Haridas*, 11 Cal. 348. Husband's brother to sister's son, *Muthan Chetty v. Ramasamy*, 16 M.L.J. 550; father's brother's grandson to brother's daughter's son, *Re Oday Churn*, 4 Cal 411. For the widow's rights, see *Gunga v. Baboo*, 1 W.R. Mis. 3 ; *Protap v. Poorna*, 14 W.R. 415; the widow excludes the daughter, and therefore, in the presence of the former, the latter can not be said to be interested in the estate for the purposes of sub-seo. (4), *Jagtaran Kusr v. Gastr Debi*, A.I.R. 1986 Pat. 490-168 I.C. 861. Sister's daughter's son is no heir and therefore not entitled to a certificate, *Krishnadasa v. Secretary of State*, 85 Cal 681 : 7 C.I.J. 555 : 12 C.W.N. 458. For the position of an assignee from heir, read A.I.R. 1952 Raj. 167. The nominee of a subscriber to a Provident Fund has a better claim to the Fund money than the subscriber's heirs, *Ekbal Ahmed v.*

Mahomed Maqsood, 79 C.L.J. 162—A.I.R. 1945 Cal. 384. The Court has no jurisdiction to grant succession certificate in respect of an insurance policy which has been assigned and the assignment has been notified to and accepted by the company. *S. Misra v. Mangala Kumari*, 25 Pat. 258—A.I.R. 1946 Pat. 415—228 I.C. 609.

What are no grounds for refusing Certificate:—A Judge should not refuse to grant a certificate simply on the ground that a regular suit involving the question of succession between the parties is pending before a Civil Court. *Eassa v. Amir Bibi*, 73 P.W.R. 1914 : 176 P.L.R. 1914 : 24 I.C. 898; or on the ground that the applicant might have asked for probate. *Kali Dasi v. Bai Mahali*, 16 Bom. 719. An application for a succession certificate should not be dismissed simply on the ground that complicated questions of law and fact would have to be gone into or that the questions involved are far too complicated for the purposes of a summary proceeding. *Lakshminarayan Chetti v. Seshama*, I.L.R. (1943) Mad. 280—(1942) 2 M.L.J. 662—1942 M.W.N. 620—A.I.R. 1942 Mad. 709—204 I.C. 264. Read also *Venkata Krishna v. Narusubhai*, 1954 M.W.N. 625—A.I.R. 1954 Andhra, 29.

Joint Certificates:—The Act does not say either way as to the validity of a grant of certificate to several persons jointly. All that sub-sec. (4) says is that selection should be made according to interest and fitness. From this it has been held that a joint grant is not permissible see *Modan Mikan v. Rani Dyal*, 5 All 196 : 1882 A.W.N. 215 ; *Re Seetaram*, 4 N.W.P.H.C. 60 ; *Jannalai v. Hastulai*, 11 Bom. 179 ; *Lonachand v. Uttamchand*, 15 Bom. 648. The Madras High Court endorses this view, though it concedes that under exceptional circumstances, a joint certificate can be granted to several persons, *Narayana Scm v. Kuppusami*, 19 Mad., 497 : 4 M.L.J. 112 ; *Re Pappammal*, 70 Mad. L.W. 907. Cf. *Maung Pou v. Maung Sau*, U.B.R. (1897-1901) Vol. II, 563. Evidently, the system of making a joint grant is fraught with obvious inconveniences. *Sukumar Deb Roy v. Parbati Bala*, I.L.R. (1941) 2 Cal. 311—A.I.R. 1941 Cal. 668. It seems that though the Court prefers a single to a joint grant, the latter is not altogether illegal; because how the Court is to make a selection where the rival claimants have equal interest and the same degree of fitness? In an Allahabad case a joint grant made by consent of parties was allowed. *Ram Raj v. Brij Nath*, 35 All. 472 : 11 A.L.J. 717 : 20 I.C. 889. Cf. *Ameerunnissa v. Affutoonissa*, 12 W.B. 507. The Rangoon Court has held that though the grant of a joint succession certificate is inconvenient, still there is nothing *per se* illegal in it. *Daw Ohn v. Daw Saw*, 1937 Rang. L.R. 408—A.I.R. 1937 Rang. 336. For the Patna view (negative), read *Syed Ahoan v. Mt. Sayeeda Begam*, 1958 Pat. L.R. 111. The recent Calcutta opinion is in favour of the possibility of joint grant, especially when the applicants themselves agree to accept a grant in that form. *Sukumar Deb Roy v. Parbati Bala*, I.L.R. (1941) 2 Cal. 311—A.I.R. 1941 Cal. 668—198 I.C. 471. When a joint grant is made, all the grantees can conjointly exercise the power vested in them by the grant. In the event of death of any one of them, the collective power does go by survivorship to the living

g'antees. The effect of such death is that the grant becomes wholly inoperative necessitating a fresh grant after a formal revocation of the old one, *Ibid.*

Civil Procedure Code, if applies:—This Part does not say anything about the application of the provisions of the C. P. Code to proceedings hereunder. But in view of the accepted interpretation of sec. 141 of C.P. Code, 1908, those provisions may be applied. Cf. 22 C.W.N. xiv, xviii, but the summary character of the proceeding itself, will render many of those provisions naturally inapplicable, e.g. the appointment of a receiver by the certificate Court will be inconceivable, Cf. *Kanhaiya v. Kanhaiya*, 46 All. 872 (976) : A.I.R. 1924 All. 876. An order of the certificate Court seems to be reviewable under O. xlvi, Cf. *Norain Dei v. Parmashari*, 40 I.C. 124 (All.) *Vide also* sec. 884, *infra*. In a recent Allahabad case it has been held that this Part cannot be treated as analogous to the other Acts like the Guardians and Wards Act and the Bengal Tenancy Act, to which the general provisions of the Civil Procedure Code have been held to apply. Sec. 141 (of C.P. Code) cannot be made applicable to the Succession Certificate Act except in so far as it is expressly introduced by sec 884 (3) and also as a corollary by sec. 888 (3). The result is that it is not competent for a Court sitting as a certificate Court, working the provisions hereof, to entertain an application for the appointment of a receiver, and if the Court does so, it acts without jurisdiction, *Kanhaiya v. Kanhaiya* 46 All 872 : 22 A.L.J. 345 : A.I.R. 1924 All 876 79 I.C. 363 On the death of an applicant for a succession certificate, there is no question of the right to apply surviving to the heir of the deceased and therefore there arises no question of substitution as contemplated by O. xxii, r 8 of the C.P. Code, and the whole proceeding will lapse or abate by reason of the death of the applicant, *Fatimah Begum v. Shk Mahidin*, 48 C.W.N. 673.

Amendment of Certificate:—A Court can exercise its inherent power and amend a succession certificate if all that is required is in reality correction of misdescription, *Sunder Singh v. Karam Singh*, A.I.R. 1928 Pat. 892 = 110 I.C. 479. As to the power of amending the certificate in respect of powers as to securities, *vids* sec. 378, *post*.

Abatement of the application on the applicant's death:—The right to present an application for a succession certificate is a personal one and does not survive to the legal representative of the applicant on the latter's death. So when the applicant dies the whole proceeding abates and no order for substitution can be made, *Hamida v. Rabia* 1937 A.M.L.J. 40; *Deo Kumar v. Kailash Singh*, A.I.R. 1961 Pat. 304—following 48 C.W.N. 673, cited above.

Costs:—Where the Government is made party unnecessarily, the applicant is bound to pay cost to the Government, *Government v. Sanoola*, 3 W.R. 28. In Bombay costs of summary proceeding hereunder are not calculated *a devalorem* on

the basis of Rule 1 of Sch. III of the Bombay Pleaders Act, 1920, but should be fixed on the basis of Rule V of Sch. III of that Act which provides a fixed fee *Rajrajeshwar Ashram v. Svarupanand Tirtha*, 29 Bom. L.R. 1081 = A.I.R. 1927 Bom. 499 = 103 I.C. 687.

Adjournment Cost:—Where adjournment cost is ordered to be paid as a condition precedent to the grant of certificate, the certificate cannot issue unless such adjournment cost is paid off, *Verabhadrapappa v. Chinnamontia*, 21 Mad 403.

374. [Suc. Cert. S. 8] When the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted—

- (a) to receive interest or dividends on, or
 - (b) to negotiate or transfer, or
 - (c) both to receive interest or dividends on, and to negotiate or transfer,
- the securities or any of them.

Contents of Certificates —The certificate that is granted should specify the debts and securities mentioned in the petition, *Maung Tha v Maung Hla*, 8 I.C. 996. It may also authorise the person to whom it is granted, (1) to draw interest or dividend on the security, or (2) to negotiate or transfer the same or (3) to do both. Ordinarily, the grant should be both for the principal debt and the interest. Where the Court ordered that a Hindu widow, to whom the certificate was granted, was to draw only the interest on the principal money, which was to remain in deposit with a Bank, it was held that the order was *ultra vires*; all that the Court could do was to take security for rendition of account of the principal amount of the debts and the securities, *Shib Das v Ajudhia*, 9 I.C. 671; *Jai Dei v Banwari*, 35 All. 249 : 11 A.L.J. 248 : 19 I.C. 447 : where a certificate granted to a widow directed her only to enjoy the interest, she could maintain a suit for a declaration that she was entitled to the whole amount, *Keljo Ram v Ram Kuar*, 32 All 816 : 7 A.L.J. 811 : 5 I.C. 590 (593). In an old case it was held that when a widow holder of a certificate applied to negotiate certain promissory note, she was bound to account for possession of the same, *Re Didgascandars*, 16 W.R. 267 ; *Re Bhuggobutty Debga*, 9 W.R. Mis. 18. As to a certificate for collection of a part of a debt, *vide notes and cases at p. 895, ante*. This section does not apply to a fixed deposit in a Bank inasmuch as such deposit is not a security within the meaning of sec. 870 (2).

375. [Suc. Cert. S. 9] (1) The District Judge shall in any case in which he proposes to proceed under subsection (3) or sub-section (4) of section 373 and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover as trustee for all persons interested, such amount as may be recoverable thereunder.

Security from grantee of Certificate:—When a certificate is granted under sec 373, sub sec (3) or (4), the Court must (note the word "shall") take security from the grantee, and this section leaves no discretion to Where requisition of the Court in the matter *Rajam Chetty v Edalapalli*, (1912) security is compulsory.

M W N 585. 11 M L T 386 : 14 I C 303 When the question of title is in doubt, and the Court grants a certificate to the person having *prima facie* the best title, under sec 373 (3), taking of security is compulsory. *Rukman v Sain Dis* 137 P R 1907, *Champalal v Lacheribar*, 57 I C 641 (Ass.), *Venkata Krishna v Narayanaswami*, 1954 M W N. 625-A J.R. 1954 Andhra, 28. Likewise, security should be demanded, when the Court makes selection from among several rival claimants under sec 373 (4). *Azam Khan v Ameeran*, 12 W.R. 38; *Neazmu' Haque v Mt Moulu*, A I R 1934 Pat 804-149 I C 1011. Cf.

In what cases the Court *Champalal v Lacheribar supra* In the other cases, taking has a discretion in the matter of security is not compulsory, and the Court has a discretion matter of security in the matter, note the word "may" So, it has been held that where the case does not fall under clauses (3) and (4) of the section, the Court will have a discretion to ask or not to ask for security but it will not be too jealous to protect the contingent rights of reversioners. *Mohr Singh v Mt Gujri*, A.I.R. 1935 Pesh 140-158 I C 175 As a general rule the natural heir has the best title to the deceased's estate, *Abdul Ali v Abdunnisa*, W.R. 1864, Mis 14, and may be granted a certificate without any security at all as it will not be necessary for him to render any account to any one else. Cf *Dinobundhu v. Raymokheri*, 15 W.R. 73, *Surfoji v. Kamakshamba*, 7 Mad 452 To demand a security from

the natural heir might in many cases create an unnecessary obstacle to his recovering the debts before they become time-barred. For instance, a son inherits G. P. Notes of considerable value from his father, and the Court in its discretion demands security from such son when he asks for a certificate; but suppose, the son has no other property which he can offer as security; the result will be that he loses his heritage. Cf *Mohanlal v. Sarat*, M.A. 286 of 1925, decided on 12th Feb. 1926, per Cuming and Page JJ. (Cal.). For this reason, their Lordships of the Allahabad High Court said that where a Hindu widow succeeds to the estate of her husband, she should not be called upon to give any security at all, *Kausila Kaur v. Sukhdev*, 21 A.L.J. 452 : A.I.R. 1923 All 679 : 74 I.C. 761. The Madras view is to the same effect, *Swarajya v. Anantha*, (1945) 1 M.L.J. 177 = A.I.R. 1946 Mad 505 ; *Gurulinga v. Thiyayayaki*, (1948) 1 M.L.J. 843 = A.I.R. 1948 Mad 522. The Patna Court also has held that a Hindu widow is entitled to the grant of a succession certificate in respect of her husband's assets unconditionally. The fact that there are reversioners to the estate is no ground for imposing condition on the grant. The Courts should not go out of their way to make it difficult for a legal heir to obtain the grant. *Badr Naram Sahu v. Lachminia*, A.I.R. 1935 Pat. 10 = 152 I.C. 803. Likewise, it has been held that where the requisition of security is optional, security should not be taken from the widow of a separated Hindu asking for a certificate to enable her to collect debts due to her husband, *in the absence of special circumstances rendering the taking of security necessary*, *Narain Dei v. Parmeshwari*, 40 All 81 : 42 I.C. 941 ; *Lingamma v. Venkayya*, I.L.R. (1945) Mad 44 = (1944) 1 M.L.J. 288 = 1944 M.W.N. 207 = 67 I.W. 220 = A.I.R. 1944 Mad 374. Similarly, in a Madras case it has been held that it is not obligatory on the Courts to demand security whenever a Hindu widow applies for the grant of a certificate to her, *Chinnaswami Chettiar v. Ponnu Ammal*, 2 L.W. 852 : 28 I.C. 682 — distinguishing *Sundrammal v. Kullipa Chettiar*, 5 M.L.J. 86 [in this case the Judge was unable to decide which of the rival applicants was entitled to succeed to the estate, and therefore the case came under sec. 373 (4), under which, requiring of security is compulsory]. It is no justification to say that security from a Hindu widow is necessary for the protection of the reversioners' interest, because "it is no business of the Court to go out of its way to look after the reversioners who have no vested interest and to assume everything against the widow," *Kausila v. Sukhdev*, *supra*. The Calcutta High Court has however, expressed the view that it is desirable to take some security in the case of a Hindu widow or other limited interest holder, *Sukumar Deb Roy v. Pasbate Balu*, I.L.R. (1941) 2 (Cal.) 911 = A.I.R. 1941 Cal. 663 = 198 I.C. 471. If security is necessary the Court will grant a certificate conditional on furnishing security, whereas if security is not necessary, certificate should be granted unconditionally, *Jai Dei v. Banwarlal*, 85 All. 249 : 11 A.L.J. 248 : 19 I.C. 447 (referring to *Shib Dei v. Ajudhia*, 9 I.C. 671 (All.)). Where an order has been passed unconditionally without demanding security, subsequent imposition of security before issue of certificate will be bad, *Canganahar*

Nanda v. Annapurna, A.I.R. 1952 Orissa, 160. Where security is demanded from Amount of Security to the grantees of certificate, the Court should specify, in the be specified in the order, the amount of security and the time within which it is order.

to be paid, *Gulraji v. Jugdeo*, 28 All. 477 : 1906 A.W.N. 94.

A person who has given security and executed a bond hereunder cannot be relieved of his liability so long as the certificate holds good, *Kamal Din v. Huzram*, 5 P.L.R. 1901. Where the certificate is granted to a minor through a guardian, the provisions of this section can be satisfied by the guardian depositing the necessary security *on behalf of the minor*, *Krishnama Charlu v. Venkammak*, 86 Mad. 214 (215) : (1912) M.W.N. 411 : 15 I.C. 408 ; see also *Gulab Chand v. Moti*, 25 Bom. 528 : 9 Bom. L.R. 796, *supra*. The next friend cannot be asked to execute the bond on his own account, *Re C. V. Nayagam*, A.I.R. 1936 Kang 466. If certificate is granted conditionally on giving security, and the order is not complied with, a second application for the certificate cannot be refused on that ground, *Poorna Koer v. Chunilal*, 14 A.L.J. 654 : 85 I.C. 718 ; the security under this section does not enure to the benefit of the contingent interest, as that of a reversioner after a Hindu widow, *Bapson v. Somnath*, 5 Bom. L.R. 919. The bond should be taken in the name of the Judge, *vide* notes at p. 561, *ante*.

Stamp duty on Security Bond :—The duty is to be given under Art 2, Sch. I, of the Indian Stamp Act, II of 1899, (as amended in 1922) which also applies to an Administration Bond under sec. 291. Compare the Reference, 42 C.L.J. 5 (F.B.), overruling *Dwarkanath v. Saitaja*, 21 C.W.N. 1150, Cf. *Sarbo v. Safar*, 49 Cal. 997.

Assignment of Bond :—Assignment of the bond is necessary when action has to be taken upon it *see Mayan v. Chattrappan*, 14 Mad 478 ; *vide* also the notes and cases at pp 561 and 565, *ante* Cf. *Sukumars v. Protap*, 24 C.W.N. 72 (n), *Kamsen Kumar v. Hirralal*, 23 C.W.N. 769. An application for assignment of a security bond should not be rejected without perusal of the bond or without proper consideration of the relevant circumstances, *Surendra Narain Singh v. Lal Bahadur*, A.I.R. 1935 All 705—154 I.C. 816.

"Securities received by him" :—When money is recovered on the strength of a certificate granted hereunder, the certificate holder acquires no title over the money, but simply holds it as a trustee for the person to whom the money belongs, *Gobinda Chunder v. Gajaryamoni*, 29 W.R. 270.

Appeal :—No appeal lies from an order requiring security, *Ekaqwanji v. Manilal*, 13 All. 214 ; *Bai Devkore v. Lal Chand*, 19 Bom 790 ; but the propriety of an order requiring security can be considered in the appeal from the final order refusing certificate following the default in furnishing security, *Eai Dev Kori v. Lalchand*, *supra*. On this principle it has been held that an appeal will lie against

an order granting Succession Certificate conditional on the applicant furnishing security, *Biri v Barkhurdar*, 4 P.L.R. 1909 : 4 I.C. 639. No appeal lies from the order exempting imposition of security, 31 Pat. 401 = A.I.R. 1968 Pat 186. For the appellate Courts' power to scrutinise the discretion of the trial Court, see *Kiranji v. Subhabhat*, 8 Bom. 28; *Zaparte Marshall*, 5 Ch. D. 878; *Golding v. Wharton Salt Works Co.* (1876) 1 Q.B.D. 874; also 19 Bom. 790 (796), *supra*.

Revision:—Rejection of an application for assignment of a security bond without perusing the bond itself is a material irregularity in the exercise of jurisdiction and is liable to be set aside in revision by the High Court, *Surendra Narain Singh v. Lal Bahadur*, A.I.R. 1935 All. 705 = 164 I.C. 816. Comp. A.I.R. 1968 Mad 906.

376. [Suc. Cert. S. 10] (1) A District Judge may, on the application of the holder of a certificate under this Extension of certificate. Part, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in section 375 may be required, in the same manner as upon the original grant of a certificate.

Extension of Certificate:—This section empowers the Judge to extend the certificate to any debt or security not comprised in the original petition. But this is possible only on the application of the holder of the Certificate himself, and not of any other person (e.g. an assignee from such holder). *Raja Damara Kumar (of Kalahasti) v. Rama Rayanigar*, 19 M.L.J. 466 : 6 M.L.T. 161 : 3 I.O. 84. The next friend or guardian can however apply hereunder, *Godavarti v. Gadavarti*, 16 I.C. 797 (Mad.). The extended certificate has to bear a higher rate of duty, vide Articles 11 and 12 of Sch. I of the Court Fees Act, 1870 (as amended by the various Provincial Acts of 1922).

Appeal:—The extension of a certificate under this section is not a grant of certificate so as to give a right of appeal (under sec. 384) against the order allowing such extension, *Nenkateswarulu v. Brahmaravulu*, 26 Mad 684. But an order refusing to grant an extension of a certificate for the collection of debts not comprised in the original application is appealable, *Radharaman v. Gopal Chunder*, 27 C.W.N. 947 : 80 I.C. 618. An extended grant confers the very same powers as the

original grant does, *vide* notes under secs. 374 and 375; also *Charusila v. Jyotisha*, 88 I.C. 157 (Cal.) For the difference between an extended certificate and a fresh certificate, compare *Re Saroja Bashini*, 20 C.W.N. 1125 : 36 I.C. 125. As to security for the extended grant, the Court is to follow the principle of sec. 375, *supra*.

377. [Suc. Cert. S. 11] Certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in Schedule VIII.
 Forms of certificate and extended certificate.

For forms of certificates and extended certificates, *vide* Sch. VIII, *infra*. It should be noticed that both the original and extended certificates specify the powers referred to in sec. 374, *supra*.

378. [Suc. Cert. S. 12] Where a District Judge has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge may, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring any of the powers mentioned in section 374 or by substituting any one for any other of those powers.

Amendment of Certificates as to powers:— This section gives the Judge a discretion to vary the powers contemplated in sec. 374. But the Judge cannot act *suo motu*, under this section; there must be some application made to him; and cause must be shown to his satisfaction. He may refuse to extend the powers if no just ground is made out. Cf. *Sunder Singh v. Karam Singh*, A.I.R. 1928 Lab. 892—110 I.C. 479. Thus, where a certificate was granted to a minor's guardian in respect of certain securities, and the guardian applied for powers to negotiate them, the Court justly refused his application. *Re Radhaballabh*, 8 Cal. 800. Neither this section nor sec. 374 will authorise the Judge to limit a Hindu widow's power to collection of interest or dividend only, *vide Shil Dei v. Ajudhia*, 9 I.C. 571 (All) and the other cases at p. 707, *supra*. The power of the Judge to alter, vary or amend the powers under this section is discretionary, and his order is not open to any appeal. Cf. sec. 384. The propriety of a discretionary order should not be challenged in revision also, see *Bai Devkore v. Lalchand*, 19 Bom. 790, and the other cases cited at pp. 710-11, *ante*.

379. [Suc. Cert. S. 14] (1) Every application for a certificate Mode of collecting or for the extension of a certificate shall be Court fees on certifi- accompanied by a deposit of a sum equal to the cates. fee payable under the Court-fees Act, 1870, in respect of the certificate or extension applied for.

(2) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

(3) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

Mode of Collecting Court-fee:—Every application for a certificate or for an extension of certificate must be accompanied by a deposit of proper duty (calculated according to the provisions of Article 12 of the Sch I of the Court Fees Act, 1870, as amended by the Provincial Acts of 1922). The words "deposit" and "sum" show that the Court is to accept the amount in *cash*. See the High Court C.O. 1918, p 120, sec 9, cl (d). The Court cannot compel the applicant to deposit the sum in Treasury.

Every application:—Every application must be accompanied by a deposit whether it be for an original grant or an extended grant. The words "every application" will include the case of a *fresh* certificate for a debt for which a certificate was taken and duty paid by another person. So where the widow of a deceased Hindu took a certificate in respect of certain debts on payment of proper duty thereon, and after her death the daughter (of the deceased) applied for a *fresh* certificate and claimed exemption from payment of duty for the debts already paid for by her mother, the Court held (1) one fiscal Act could not be construed by another, (2) the applicant could not be excused, and was bound to pay the duty over again, *Re Sarojabaihens*, 20 C.W.N. 1126 : 86 I.C. 126.

Sub-secs (2) & (3): The amount of deposit how disposed of:—As soon as the order for issue of certificate to the applicant is passed, the amount of deposit becomes at once legally appropriated as duty to the extent of the debt covered by the order, and cannot therefore be refunded, *Sankara Aiyer v. Nainar Moopanar*, 21 Mad. 241. Under sub sec. (2), such amount is to be expended in buying stamp to be used for denoting the fee; and under sub-sec. (3) the amount not so appropriated, nor so expended, shall be refunded to the person who deposited it. See *Sankara Aiyer v. Nainar Moopanar*, *supra*. An applicant for succession certificate, who misses the certificate in consequence of his inability to furnish security, can ask for refund of his unexpended deposit money, *Re Fatma Bt*, I L.R. (1941) Nag. 576—1988 N.L.J. 568—A.I.R. 1940 Nag. 68—185 I.C. 872; *Parkash Wali v. Province of Punjab*, I L.R. (1942) Lah. 74—43 P.L.R. 624—A.I.R. 1941 Lah. 899—197 I.C. 108. Obviously, it can be refunded to the representative of the depositor in the event of his death.

380. [Suc. Cert. S. 15] A certificate under this *Part* shall have effect throughout ^{1***} ^{2[India]} ^{3***}.

Local extent of certificate.

⁴[This section shall apply in ^{2[India]} ⁵after the separation of Burma and Aden from India to certificates granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date].

⁶[It shall also apply in ^{2[India]} ^{7***} after the separation (dated 15th August, 1947) of Pakistan from India to certificates granted before the date of separation or after that date in proceedings pending at that date in any of the territories which on that date constituted Pakistan].

Local extent of Certificate:—A certificate granted under this Part shall have effect throughout the *whole* of British India. Once the certificate is obtained, it will authorise collection of debt in any part of British India, but not outside it. Cf. *Lee v. Moore*, Palm. 168; *Touston v. Flower*, 3 P.Wms. 369. Compare this section with sec. 278, *supra*. Vide also the notes and cases under that section. For a certificate granted or extended by the British representative in a Foreign State, vide sec. 882, *infra*. The section gives effect to that general rule of International Law, which says that a grant conferring the right of representing the deceased's estate is intra-territorial in its operation. Cf. *Le Briton v. Le Quesne*, 2 Cas. Temp. Lee, 261; *Attorney-General v. Bouwens*, 4 M.L.W. 193.

381. [Suc. Cert. S. 16] Subject to the provisions of this *Part*, the certificate of the District Judge shall, with Effect of certificate. respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

*N.B.—*This section does not apply when the deceased's property vests in the Government by reason of escheat. *Secretary of State v. Girdhari Lal*, 54 All. 226—1932 A.L.J. 150—A.I.R. 1932 All 220—186 I.C. 565.

1 The word "all" omitted by Act xlvi of 1952, sec. 8 and Sch. II.

2 Substituted by Act iii of 1951, sec. 8 and Sch. for "the States".

3 The words "of India" omitted by the A.O. 1950.

4 Inserted by the A.O. 1957.

5 1st April, 1957.

6 Added by the A.O. 1948.

7 The words "of India" omitted by Act xlvi of 1952, sec. 8 and Sch. II.

Effect of Certificate:—(1) The certificate is conclusive, with respect to the specified debts and securities, as against the persons liable thereunder; (2) it affords full indemnity to the persons so liable in respect of all their payments to, or dealings with, the holder of the certificates. So the person obtaining the certificate becomes entitled to recover the debt due to the deceased, and to give a valid discharge, *Muthia v. Rumanathan*, (1918) M.W N 242 : 7 L.W. 880 : 49 I.C. 972 : it gives protection to parties paying debts to the representatives of deceased persons, *Champalal v. Lachiribai*, 67 I.C. 641 (Neg); *Romanlalji v. Haridas*, 88 All. 477 ; it simply eliminates the risk of the debtor making the payment, and does nothing more, *Sukumar Deb Roy v. Parbati Bala*, I.L.R. (1941) 2 Cal 811 = A.I.R. 1941 Cal. 668 = 198 I.C. 471. Cf. *Bai Kashi v. Parbhu*, 28 Bom. 119 ; *Sharapit v. Khurshed*, 49 I.C. 958 (Pat.) ; *Bhugabutty v. Bholanath*, 8 W.R. 817 ; *Ram Saran v. Gappu Ram*, 71 P.W.R. 1916 : 88 I.C. 603 ; *Shew Shelty v. Jumna Bai*, I.L.R. (1956) Hyd. 142 = A.I.R. 1956 Hyd. 59. Compare the 'Effect of Probate' at p. 430, *ante*, and the "Effect of Grant," at p. 420, *ante*. The section requires that the payment should be in good faith, and a payment will be in good faith, if made "honestly," no matter that it was made without due care and caution, *M. & S. M. Ry Co. v. Gangammal*, A.I.R. 1928 Mad. 484 = 109 I.C. 696. A defendant holding funds of the deceased cannot resist a certificate holder's claim in respect of that money by setting up an oral will in his favour, which he is unable to establish, *Isarmal v. Nichomal*, A.I.R. 1931 Sind 81 = 181. I.O. 194. The grant of certificate does not confer any title upon the grantees as an heir to the deceased *Sukumar Deb Roy v. Parbati Bala*, I.L.R. (1941) 2 Cal. 811 = A.I.R. 1941 Cal. 668 = 198 I.C. 471 ; nor does it constitute any proof of the debt, nor determines the frame of a suit in which the claim has to be enforced. The certificate only renders unnecessary the trial of the question, whether the claimant is entitled to maintain it as the representative of the deceased, *Mahomed Abul Hossein v. Sharifan*, 16 C.L.J. 384.

The legal position in this connection has been thus stated in a Calcutta case :

Effect of death of a Joint Grantee of Certificate. If a certificate is granted to two or more persons jointly, the authority vested in them can be exercised by all of them together and if one of them dies, the remaining certificate holders cannot exercise the powers which could only be exercised by them along with the deceased, and as there is no estate vested in any of the grantees no question of survivorship at all arises. That is, on the death of one of them the certificate becomes wholly inoperative entailing the necessity of issuing a fresh certificate, *Sukumar Deb Roy v. Parbati Bala*, I.L.R. (1941) 2 Cal. 811 = A.I.R. 1941 Cal. 668 = 198 I.C. 471. This decision is based on a misconception of the doctrine of survivorship. That doctrine proceeds on a fictional corporation of several persons into one legal entity or juristic existence not liable to disintegration by reason of fluctuation of the number of persons forming the corporation. This juristic conception remains intact irrespective of any consideration whether a legal

estate is vested in the body corporate or a mere power is vested in it. Undoubtedly the certificate invests the joint grantees with a power, if not with a legal estate. There is no reason why the doctrine should not be applied in relation to the attenuated corporation after the demise of one of its members conceding the power in favour of the survivors. It is difficult to follow why the power should lapse during the continuity of the juristic existence.

Debt:—As to what will be considered to be a debt or not a debt within the meaning of this section, read the notes under sec. 214, under the heading, "What is or is not debt," at pp. 393, *et seq.* A mortgage is not a debt within the meaning of this section, *Ramu Singh v. Aghori Singh*, A.I.R. 1938 Pat. 68=178 I.C. 487.

Position of Person holding a certificate on behalf of a Minor:—There is some distinction between a *certificated* guardian and the guardian who holds a succession certificate on behalf of a minor. The power of the former ceases as soon as the minor attains majority; whereas the power of the holder of the certificate does not come to an end so long as the minor does not, on attaining majority, get the certificate revoked; so that a payment to the holder of the certificate until revocation thereof will give a valid discharge, *Ganpaya v. Krishnappa*, 26 Bom. L.R. 491: A.I.R. 1924 Bom. 394: 80 I.C. 422.

Conclusive:—A person who is granted a Certificate acquires a conclusive title to recover debts due to the deceased, and if anybody refuses to pay the debts to him he acts wrongly and as such must pay interest, *Oriental G.S. Life Assurance Co v. Venkateswara Amminaju*, 95 Mad. 162: 9 M.L.T. 451: (1911) 1 M.W.N. 276: 10 I.C. 369; *Sithambaram Vadivelu Ammal v. Thirupal K. Pillai*, 89 M.L.J. 405=A.I.R. 1928 Mad. 56=106 I.C. 125. The language of the section clearly shows that the certificate is conclusive as against the debtors and the persons liable on the securities, [*Bunahao v. Syed*, 2 W.R. 70, *Rupan v. Bhagelw*, 86 All. 428: 12 A.L.J. 524: 25 I.C. 320] and, therefore, such persons are bound to make payment to the certificate-holder, who alone can give them discharge from the debt upon payment, *Kuchu Iyer v. Venguammal*, 80 M.L.J. 482=A.I.R. 1926 Mad. 407=(1926) M.W.N. 116=23 L.W. 728=93 I.C. 360; read also *Thenappa Chettiar v. Indian Overseas Bank Ltd.*, (1949) 2 M.L.J. 201=A.I.R. 1949 Mad. 749 (case of a person in Federated Malay States, when overrun by Japan). It is not for the debtor to question the right or title of the certificate-holder, *Charan Das v. Nathumal*, A.I.R. 1934 Lah. 79=148 I.C. 240. A debtor cannot maintain a suit to set aside a succession certificate obtained in respect of the No suit lies to set aside very debt he owes, *Ibid*; but the Madras High Court has a certificate held that a member of a joint Hindu family can maintain under sec. 42 of the Specific Relief Act a suit for a bare declaration that he is entitled to collect the deceased's debts as against the person to whom a Succession Certificate has already been granted, *Chinnappa v. Tulsi*, 15 M.L.J. 899. Of

Russek v. Ramlal, 22 W.R. 301; *Sharafat v. Khurshed* 49 I.C. 958 (Pat.). A judgment-debtor cannot go behind the terms of the Succession Certificate, *Gulam Khalig v. Tasardak Ali*, 28 C.L.J. 299 : 46 I.O. 860; *Pearilal v. Jhabhalal*, 82 I.C. 604. So it has been held that the section is conclusive of the right of the Certificate-holder enabling him to collect or sue for the debt due to the deceased, *Mesnatchi v. Anathanarayana*, 26 Mad. 224 : 12 M.L.J. 180; *Sharafat v. Khurshed*, *supra*; and this will be the position even if somebody else other than the Certificate-holder turns out to be the heir of the deceased, *Paramananda Chary v. Veerapppan*, 39 M.L.T. 611 = A.I.R. 1928 Mad. 213 = 107 I.C. 481. An assignee of a deceased creditor acquires a conclusive right against the heirs of a deceased debtor (mortgagor), *Azmal Ali v. Sitala Bux*, 9 A.L.J. 766 : 16 I.C. 108; Cf. *Shilram v. Muhammad*, 29 P.R. 1899; *Meher Chand v. Syed Muhammad*, 99 P.R. 1669; *Peringadi v. Peringadi*, 6 M.H.C.R. 288; *Gauri v. Gayaden*, 4 All. 365 : 1882 A.W.N. 66. A mortgage not being a debt under this section, nor a security under sec. 370, no succession certificate is necessary for it and if a succession certificate is at all taken in respect of it, that will not give the certificate-holder any title to sue on the mortgage, (executed in favour of his deceased brother). He can sue only on the basis that he is an heir of his deceased brother, and the certificate can at best furnish some evidence for the purpose, *Ram Singh v. Aghori Singh*, A.I.R. 1928 Pat. 68 = 173 I.C. 487; *Comp. Rahmatullah v. Sabha Bibi*, 1938 A.W. 21 (B.R.).

Not conclusive of what matters:—A finding as regards an adoption by the Certificate Court is not conclusive, *Sardar v. Ram*, 1102 A.W.N. 62; nor is it conclusive on a question of heirship, which may be tried afresh in a regular suit, see *Bhugabutty v. Bholanath*, 8 W.R. 317; *Jhanjoo v. Dameenah*, 17 W.R. 349; *Chundromoni v. Rasubehari*, 21 W.R. 24; *Hiro v. Ramanunda*, 22 W.R. 274; *Gouree v. Lachman*, 22 W.R. 102; *Paramananda Chary v. Veerapppan*, *supra*. Similarly, a finding of such Court, as to the validity of a will, will not be conclusive and will not debar a subsequent proceeding, *Anund Chunder v. Banerjee*, 11 W.R. 127; *Kalee Chunder v. Gobind*, 12 W.R. 454; *Anand Mohan v. Indromoni*, 16 W.R. 214; *Sokha v. Woorma Sundari*, 18 W.R. 265. In a later case however it has been held that a question fully dealt with upon all the available materials will preclude a re-agitation over it between the same parties, *Giecharie v. Phuljhurie* 24 W.R. 173. Cf. *Ram Kripal v. Rup Kuari*, 11 I.A. 37 and *Hook v. Administrator-General*, 48 Cal. 499 : 33 C.L.J. 405 : 25 C.W.N. 915 (P.C.), but these decisions should be read subject to sec. 387, *infra*. Cf. Sec. 384 which gives finality to a decision of the Certificate Court, subject to other provisions of this Part, e.g. sec. 387.

What rights cannot be conferred by a Certificate:—A succession certificate merely entitles the holder to collect the debts due to the deceased, and not to recover possession of the deceased's moveable or immoveable properties, *Mahalir Saran v. Lila Baldeo Sahai*, 1 I.C. 205 (Cal.). The certificate does not make the grantee the heir of the deceased, but only authorizes him to collect the debts, *Ram Saran v.*

Gappu Ram, 71 P.W.R. 1916 : 98 I.C. 603 ; *Sukumar Deb Roy v Parbatibala*, I.L.R. (1941) 2 Cal. 311 = A.I.R. 1941 Cal. 668 = 198 I.C. 471. Cf. A.I.R. 1954 Pepsu, 66, cited at p. 690, *ante*. It does not and cannot determine any intricate question of title or decide what property does or does not belong to the estate of the deceased, *Waselun v Gowhurun*, 10 W.R. 85 ; *Gunindra v. Jugmala*, 80 Cal. 581. Cf. the notes under sec 373, at p. 701, *ante*. Also *Gobind v. Doorgamoni*, 23 W.R. 270 ; *Beychan v. Ganesh*, 2 N.W.P. 439. The certificate does not give any general powers of administration of the estate of the deceased but is confined only to the collection of debts, *Charusila v. Jyotish*, 88 I.C. 167.

Effect of payment to person really entitled before issue of Succession Certificate:—Payment of debt by the debtor to the person really entitled, before the grant of succession certificate, affords him complete protection against the certificate-holder, *Kuchu Iyer v. Venguammal*, 50 M.L.J. 432 = (1926) M.W.N. 116 = 23 L.W. 728 = A.I.R. 1926 Mad. 407 = 98 I.C. 360.

Court-fee for suit for recovery of money from certificate holder:—Read A.I.R. 1954 All. 166

1382. [Suc. Cert. S. 17] Where a certificate in the form, as nearly as circumstances admit, of Schedule VIII—

Effect of certificate granted or extended by Indian representative in foreign State and in certain other cases

(a) has been granted to a resident within a foreign State by an Indian representative accredited to that State, or

(b) has been granted before the commencement of the Part B States (Laws) Act, 1951, a resident within any Part B State by a District Judge of that State or has been extended by him in such form, or

(c) has been granted after the commencement of the Part B States (Laws) Act, 1951, to a resident within the State of Jammu and Kashmir by the District Judge of that State or has been extended by him in such form.

the certificate shall, when stamped in accordance with the provisions of the Court-fees Act, 1870, with respect to certificates under this Part, have the same effect in India as a certificate granted or extended under this Part.]

Certificate granted or extended by Indian Representative in foreign country:—Under this section a certificate or an extended certificate granted by the Indian representative within a Foreign State when stamped according to the Court Fees

1 Substituted by Act xxxiv of 1957, s. 2, for the former section.

Act, will have the same effect in India, as a certificate granted under this Part will have under sec. 380. A certificate of heirship stamped with the proper stamp and granted by the old Political Agent of a Native State, was to be recognised by the Civil Courts in British India, and sec. 385 would preclude the granting of a fresh certificate by such Civil Courts, *Annapurnabai v. Laksman Bikaji*, 19 Bom. 145. The underlying principle of this rule is that the law always recognises the prerogative of the Judge of the *Domicile* to determine the representative title to the deceased's property, *Goodman's Trusts*, 17 Ch. D. 266; *Andros v. Andros*, 24 Ch. D. 687. The Court of *domicile* is the *forum concursus* which the claimants upon death are to resort to for authority, *Preston v. Melville*, 8 Cl & F 1; *Dogliani v. Crispin*, L.R. 1 H.L. 301; *Comp. Enoch v. Wy'e*, 10 H.L.C 13. The right of succession is determined with reference to the *lex domicilii*. *Ammuni v. Krishna*, 16 Mad 405 (406), and any adjudication on such right by the Court of *domicile* will be accepted in this country, and this section gives effect to this principle. Cf *Re Trufort*, 36 Ch. D. 600 (611). See also *Ewing v. Orr-Ewing*, 9 A.C. 84 (41); 10 A.O. 468. Read *Footes Private International Law*, 3rd Ed. pp. 265-266. The claimant should establish his representative right in Court of *domicile* and should then apply to the Indian Representative for the issue of a certificate in his name, so as to be operative under this section, *Ammuni v. Krishna*, *supra*. The Indian representative should make a grant and not merely affix his signature to the certificate, *vide Manasingh v. Amad Kunhi*, 17 Mad 14 (16), cited *infra*.

O'd Political Agent of a Native State:—A certificate of heirship (if stamped as contemplated by this section) granted by the Political Agent of a Native State takes effect as a certificate granted under this Part, *vide supra*; also *Annapurnabai v. Laksman Bikaji*, 19 Bom. 145. Such a certificate of heirship cannot be treated by the District Judge as invalid merely because the applicant had not given to the Political Agent the necessary information as to the other relatives of the family, and no notices had been issued to them. These irregularities may be a ground of revocation of the certificate by the Political Agent, himself, but will not enable the District Judge to treat it as a nullity, *Ibid*. A true copy of a probate signed by the Political Agent of a Native State is not a certificate "granted by an Indian representative" within the meaning of the former section." Mere "affixing of signature" is not such granting as is required by this section; it may serve the purpose of sec. 86 of the Indian Evidence Act, *Manasingh v. Amad Kunhi*, 17 Mad., 14 (16). See also *Ammuni v. Krishna*, 16 Mad. 405.

Succession governed by Lex Domicilii:—The *lex domicilii* governs all cases of succession, *vide* at p. 718, *supra*; also *Poller v. Brown*, 5 East, 190; *De Bonneval v. De Bonneval*, 1 Curt. 856; *Price v. Dewhurst*, 4 My. & Cr. 76. As to the effect of grant by English Courts, read *Ewing v. Orr-Ewing*, 9 A.C. 84 (41). Cf. 10 A.C. 453.

383. [Suc. Cert. S. 18] A certificate granted under this Part may be revoked for any of the following causes, Revocation of certificate namely :—

- (a) that the proceedings to obtain the certificate were defective in substance ;
- (b) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case ;
- (c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently ;
- (d) that the certificate has become useless and inoperative through circumstances ;
- (e) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

N.B.:—Compare the provisions of this section with those of section 263, ante. The word "may" in the section makes its application discretionary with the Court, *Ratna Rai v Makhan Singh*, (1918) 1 Andhra W.R. 55.

Which Court can revoke :—A certificate can be revoked only by the Court which granted it. This, however, must be so only when the Court granting the certificate is still exercising jurisdiction in the district. A District Judge can withdraw a case to his own file under sec. 388 only when the case is pending decision, therefore where a certificate is granted by a Court, inferior to that of the District Judge, but invested with power under sec 388, the District Judge has no power to revoke such a certificate hereunder, *Sukhia Bewa v. Secretary of State*, 21 C.L.J. 154 : 19 O.W.N. 551 : 27 I.C. 821.

Clause (a) : Defective in Substance :—A certificate may be revoked for want of proper citation, *Re Chunga Bishen*, 9 C.W.N. 607 (cited at p. 487.). Cf. *Manick v. Rij*, 19 W.R. 252; *vide* the notes and cases under the heading 'Non-citation, if a ground for revocation' at p. 486, ante; also *vide* under the heading "Defective in Substance," at p. 486, ante. Where a certificate has been granted without issuing notice to a party preferentially entitled and the schedule of debts attached to the application is misleading, and material particulars have been concealed

¹from the Court, the certificate should be revoked, *Damini v. Fatumani*, 5 P.L.T. 564, A.I.R. 1924 Pat 620 : 79 I.C. 689 ; *Deity Lairakhanga v. Tasram K. Singh*, A.I.B. 1961 Manipur, 52. Where the notice for a minor is served upon a person having interests adverse to those of the minor, the proceeding will be considered "defective in substance" and the certificate will be revoked, *Sharifunnissa v. Masoom Ali*, 42 All. 347 : 18 A.L.J. 314 : 66 I.C. 380. Cf. the cases at p. 490 under "Minor not represented." Assuming jurisdiction in contravention of sec. 871 will vitiate a grant, *Rs De Silva*, 25 All. 355 ; but an erroneous decision is not tantamount to defect of jurisdiction, *Official Trustee v. Kumadini*, 97 Cal. 387 : 6 I.C. 978 ; *Juggessur v. Bhagobutty*, 14 W.R. 469.

Clause (b): Fraud and False Suggestion:—An order obtained by fraud and misrepresentation should be revoked, *Hamida v. Noor Bibi*, 9 W.R. 394 ; vide also *Mancharam v. Kulidas*, 19 Bom 821 ; *Re Bhabada Dasi*, 8 B.L.R. 18 (App.) ; *Re Jageswar Dhar*, 14 W.R. 464 ; *Madhu Krishna, In re* A.I.R. 1938 Sind, 160-177 I.C. 416. Vide also notes and cases under an identical heading at p. 497. If the schedule of debts annexed to the petition are misleading and material facts are concealed, the grant will be revoked, *Damini v. Fatumani*, cited *supra*. Cf., *Barnesley v. Powell*, 1 Ves Sen. 119 ; *Mokshadayini v. Karnadhar*, 18 C.W.N. 1108 : 81 I.C. 702. Every Court has an inherent power to make an enquiry into fraudulent abuses of its own processes, *Bihun v. Elahi*, 11 W.R. 158 ; *Khetromoni v. Madhab*, 13 W.R. 160 ; *Harrison v. Heldon*, 2 Str. 911 ; *Sheo Puran v. Collector of Surun*, 13 W.R. 256 ; but see *Venkatamma v. Chengalrayappa*, 7 Mad 655.

Clause (c): Untrue Allegation:—Vide notes and cases at p. 497, ante. An allegation as to absence of an impediment [vide sec. 372 (e)], where a will exists, will be an illustration in point. Cf. *Re Adija*, 11 I.C. 201 (Sind.) ; *Re Mohendra*, 6 C.W.N. 377 (381).

Clause (d): Useless and Inoperative:—These terms refer to circumstances which render the grant infructuous, *Balaganayadher v. Sakwari*, 96 Bom. 792 : 4 Bom. L.R. 637. Vide notes and cases at pp. 497-98, ante. When the certificate become inoperative through circumstances, it is open to the Court to revoke the original grant and modify its terms, *Sharifunnissa v. Massoom Ali*, 42 All. 347 : 18 A.L.J. 314 : 66 I.C. 380.

Clause (e):—The certificate is also revocable when it becomes practically nugatory because of some decree or order made by a competent Court. A suit for declaration of plaintiff's right to collect debts due to the deceased, is not affected by this clause, *Chinnappa v. Tulsji Ammal*, 15 M.L.J. 899.

Revocation at the instance of a person claiming under a will falling within sec. 57 (c):—Where a person claims under a will falling under sec. 57 (c) of the

Act, he can apply to have a succession certificate revoked hereunder without obtaining a probate, inasmuch as sec. 213, which requires a probate does not apply to a will falling under clause (a) of sec. 57, *Janki Bai v. Durga Bai*, 1938 A.L.J. 989 - A.I.R. 1938 All. 640.

Limitation:—The certificate can be revoked at any time when the circumstances enumerated in this section are proved irrespective of the finality of the grant by reason of no appeal having been filed against the same, *Sukhsa Bewa v. Secretary of State*, 21 C.L.J. 154 : 19 C.W.N. 551 : 27 I.C. 821.

What is no ground of Revocation:—A certificate cannot be recalled because there is an heir in nearer degree, *Kubir v. Ram Kanayes*, 17 W.R. 174. The right of transier (if any) of the certificate-holder is not affected by this Act, and no revocation can be ordered on the ground of such transfer, *Runglal v. Annalal*, 11 A.L.J. 968; *Raman Lalji v. Haridas*, 38 All 474.

Omission to apply under this Section, if bars right of Appeal —An appeal lies from an order granting a certificate and it is not incumbent on a party to exhaust his remedies under this section before preferring an appeal, *Rhdhalal v. Brudo*, 42 All. 512 : 56 I.C. 181.

Power of High Court:—The High Court can revoke a certificate wrongly issued by the Lower Court, *Mu Iyaz v. Taleb Ali*, 18 W.R. 350. Cf *Gang'a v. Riji Singh*, 9 All 173; *Susman Gossein v. Ram Charan*, 6 W.R. Mis. 48. N.B.—These are cases under sec 6 of Act XXVII of 1860; also *Re Shamlal Dass*, 6 B.L.R. Ap. 21.

384. [See Cert S. 19] (1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied

by section 147 of that Code, an order of a District Judge under this Part shall be final.

Orders appealable:—An appeal lies from an order granting a certificate and the appellant is not bound to move the Court granting the certificate to revoke it, *Radhe Lal v Bindo*, 56 I.C. 181 (All); Cf *Tarini v. Rama Sundari*, 20 W.R. 312; the order granting a certificate conditional upon furnishing security is appealable, *Biri v Barkhurdar*, 189 P.R. 1908; Cf. *Bai Devkore v Lalchand*, 19 Bom. 790; *Bhagwami v. Munjal*, 18 A.L.J. 214; *Sundrammal v. Kullara Chetti*, 5 M.L.J. 36; *Abdul Hussein v. A K Parali*, A.I.R. 1966 Madh. Pr. 225; so is an order granting a certificate to one of several claimants on condition of furnishing security, *Bai Nand Koer v. Maganlal*, 38 Bom. 272 : 18 Bom. L.R. 1208 : 12 I.C. 921. An appeal lies from an order granting a certificate for collection of a part of debt, *Sital Devi v. Debt Prosad*, 16 All 21; or from an order of a District Judge declining to grant certificate notwithstanding that the Court appended a note to it that if another application in different form was made he would consider it, *Annapurna v. Nalini Mohan* 42 Oal. 10. 18 C.W.N. 896 : 23 I.C. 566. An order refusing to grant a certificate is appealable, *Guri v. Nalita Singh*, 117 P.R. 1881; *Baya Singh v. Khera*, 68 P.R. 1883; *Muzaffar v. Rahim*, 78 P.R. 1886; (*contra*—103 P.R. 1888).

That is the position in respect of the dismissal of petition which seeks not only revocation but prays also for a grant, *S. Misra v. Mangala Kumari*, 26 Pat 203—A.I.R. 1946 Pat 415—223 I.O. 609. An appeal will lie also from an order refusing to grant a certificate of heirship under Regulation VIII of 1827, *Rangubas v. Alaji*, 19 Bom. 399; *Jasermal v. Nazir*, 18 Bom. 748, as also from an order of the Agent to the Governor of Vizagapatam, *Babubalendran v. Babubalendran*, 81 Mad 362 : 18 M.L.J. 262 ; 8 M.L.T. 264. An order revoking a certificate is appealable. The section does not mention the order refusing to revoke or cancel a succession certificate. But

the Allahabad High Court has, in one case, held that an order refusing to revoke a certificate (and grant one instead) is in effect one refusing to grant a certificate and as such is appealable under this section, *Sharifunnissa v. Massoon Ali*, 42 All. 347 : 18 A.L.J. 314 : 2 U.P.L.R. (All) 57 : 56 I.C. 880. Read the observation of Ranade, J. in *Mancharam v. Kalidas*, 19 Bom. 821 (825). In a subsequent case of the Allahabad Court, Mehta C.J. and Sen J. have held that when the order is merely one refusing to cancel a Succession Certificate, no appeal lies from the order, *Krishna Kumari v. Naubahar Singh*, 1981 A.L.J. 200—A.I.R. 1981 All. 242—110 I.C. 3. This latter view has found favour with the Lahore Court, which has distinguished the case of 42 All. 347, *supra* [see *Rura Mal v. Parmeshari*, 34 P.L.R. 685—A.I.R. 1933 Lah 56—149 I.C.—485], as also with the Patna Court [*Singeshwar Prasad v. Surja Devi*, 80 Pat 1248—A.I.R. 1952 Pat. 142]. Where a certificate is granted ex parte without giving notice to the opposite party, he is

entitled to come to Court by way of appeal; it is not incumbent upon him to ask for revocation of the certificate, *Bindo v. Radha Lal.* 42 All. 512. But see *Tapeehra v. Ajudhia*. 1881 A.W.N. 162. An order made under sec 376 (1) refusing an application to extend the certificate to any debt not originally specified therein is appealable, *Radharaman v. Gopal Chandra* 27 C.W.N. 947—distinguishing, for courtesy's sake though virtually disapproving, *Venkateswarulu v. Brahmaravulu*, 25 Mad. 634. If there be no contest before the District Court, the High Court cannot interfere or remand, *Deity Laspakhanga v. Jasren K. Singh*, A.I.R. 1961 Manipur, 52.

Orders not appealable:—There is no right of appeal where the order of the Judge is either conditional or provisional and does not eventuate in a final order, *Kanhaiya v. Kanhaiya*, 46 All. 872 (374). An order that a certificate will be granted on the applicant furnishing security is not a final Order requiring secu- rity if appealable. Order granting or refusing to grant a certificate, and is therefore not appealable. *Bai Devkore v. Lal Chand*, 19 Bom. 780 (796); *Nanhu v. Gulabu*, 26 All. 173; *Jasoda v. Sujanmal*, 63 I.C. 846 (Nag.); *Mayil Kothil Kunjunni Nair v. Vadakeveetil Kongathil*, (1910) M.W.N. 266 : 7 M.L.T. 246 : 6 I.C. 599; *Gouri Dutt v. Maikia*, 2 A.L.J. 606; *Re Poddar Sundari*, 3 All. 304; *Bhugwani v. Mannilal*, 18 All. 214 : 1891 A.W.N. 45; *Dilraj v. Jagdip*, 5 O.O. 213; *Rajmohini v. Denobundhoo*, 17 W.R. 566; *Lucas v. Lucas*, 20 Cal 215; *Rama Reddi v. Papi Reddi*, 19 Mad. 199; *Monmohines v. Khetra Gopal*, 1 Cal. 127 : 24 W.B. 363; *Sundarammal v. Kullappa*, 5 M.L.J. 86; *Re Rukmin*, 1 All. 287; *Naurangi v. Rayhubansi*, 9 All. 291; *Chitrarekha Dai v. Balu Bansman Rai*, 10 Pat. 835 = A.I.R. 1932 Pat. 117 = 135 I.C. 524. But in a Calcutta case McLean, C.J. and Banerji, J. held that an order granting a certificate though coupled with a condition that security is to be given by the applicant is nevertheless an appealable order under this section. *Radha Rani v. Br. dalun*, 26 Cal. 850 : 2 C.W.N. 59 : 1 C.W.N. 264 (n)—dissenting from *Bhaugwani v. Mansilal*, 18 All. 214 (*supra*). See also *Venkata v. Chinna*, 5 M.L.J. 28; *Arumuga v. Thagammal*, 20 Mad. 442; *Biri v. Barkhurdar*, 189 P.R. 1908 : 4 P.L.R. 1909 : 156 P.W.R. 1909; *Bai Nand Koer v. Maganlal*, 36 Bom. 272 : 18 Bom. L.R. 1208 ; 12 I.C. 92; *Kunniv v. Ellynur*, 6 I.C. 499. Order refusing to impose condition of security is not appealable, 31 Pat. 401 = A.I.R. 1963 Pat. 135. No appeal lies where the Court granted the certificate to the applicant jointly with another, *Re Pran Khan*, 17 W.R. 288; nor does any appeal lie regarding the form of certificate, *Bansu Madhub v. Nilambar*, 7 W.R. 876. There is no appeal from an order rejecting a petition to recall a certificate, *Re Nanuk Pershad*, 6 Cal. 40; or in other words, no appeal lies from an order refusing to cancel or revoke a succession certificate, *Ahmed Ebrahim v. Government of Bombay*, I.L.R. (1948) Bom. 26 = 44 Bom. L.R. 912 = A.I.R. 1943 Bom. 50 = 205 I.C. 636, relied on in *Singeshwar Prasad v. Surja Davis*, 30 Pat. 1243 = A.I.R. 1952 Pat. 142. (Read VI Legal Miscellany at p. 16) No appeal lies against an order granting an extended certificate in respect of

additional debts. *Venkateswarulu v. Brahmaravulu*, 25 Mad. 634 (*supra*)—apparently distinguished, though virtually disapproved in *Radhamaman v. Gopal Chander*, 27 C.W.N. 947 (*supra*). There is no appeal from an order directing fresh security to the extent to which a security has been diminished, *Alla Soondari v. Srinath Saha*, 20 Cal. 641. The reason for denying right of appeal to an order requiring security is that such an order is discretionary. Cf. 19 Mad. 199; 5 M.L.J. 86; 17 W.R. 566; 1 Cal. 127; 24 W.R. 362 (all cited above). N.B.—For power of appellate Court to interfere with trial Court's discretion on appeal, vide *Kirani v. Subabhat*, 8 Bom. 28. Cf. *Ex parte Marshal*, 5 Ch. D. 878.

Forum of Appeal:—When an inferior Court is invested with power under sec. 888, an appeal from an order of such Court lies to the District Judge and not to the High Court. *Mahabir v. Jai Ram*, 2 Lab. L.J. 812; *Basti Begum v. Dawlat Bahadur*, 16 O.C. 197: 21 I.C. 888; *Jajramdas v. Mangal Das* 121 P.W.R. 1917: 41 I.C. 640; *Subba Rao v. Palaniandi*, 17 Mad. 167: 4 M.L.J. 79. Read sec. 888(2). Proviso to sec. 888 lies to the District Judge or a Small Causes Court Judge, *Husain Bibi v. Hingun Bibi*. 94 All 148: 8 A.L.J. 1800: 12 I.C. 926. Although a subordinate judge, happening to be an Additional District Judge, is invested with the powers of a District Judge, still if an order granting succession certificate is made by him qua a Subordinate Judge, an appeal against his order will lie to the District Court by reason of the proviso to sec. 888(2), post, *Bisesar Sheodayal v. Jairam* 1940 N.L.J. 106—A.I.R. 1940 Nag 162—187 I.C. 119; also A.I.R. 1960 Raj. 9. In the Punjab, under Government Notifications Nos. 570 & 571 (4-11-1889), appeals from orders passed by a District Judge or Subordinate Judge lie to the Divisional Court, *Tikaya v. Launga*, 124 P.R. 1890.

Second Appeal:—There is no provision in the Act for a second appeal in any case. *Subba Rao v. Palaniandi*, 17 Mad. 167: 4 M.L.J. 72.

When appeal barred by Estoppel:—A person who has consented to a certificate being granted to himself jointly with others cannot challenge its validity by way of appeal, *Ram Raj v. Brin Nath*, 85 All. 470: 11 A.L.J. 717: 20 I.C. 869.

Power of an Appellate Court:—The Appellate Court will not ordinarily (though it can) interfere with the discretion of the trial Court, see 2 A.L.J. 696: 6 M.L.J. 86; 8 Bom. 28; 18 Bom. L.R. 1208 (cited *supra*). Where the lower Court rejected the application without entering into the merits, the District Judge, on appeal, can grant the certificate, *Chhaganlal v. Bai Nathi*, (1896) P.J. 697. The appellate Court can exercise all the powers of the Trial Court. *Ram Krishna v. Nagammal*, (1911) 2 M.W.N. 142: 10 M.L.T. 164.

Review:—Sub-sec. (3) authorises a review of the judgment of the Certificate Court, see 1 Cal. 101: 24 W.R. 376; 5 M.H.C.R. 417; 18 W.R. 413. No appeal

lies from an order rejecting an application for review, *Narain v. Parmeshwari*, 40 I.C. 124; also vide notes at pp. 500 & 572, ante.

Revision:—*Vide*, 19 Bom. 790: 1894 P.J. 897 and (1911) 2 M.W.N. 142, *supra*; also *vide* notes at p. 572, *supra*; and the observations of Ranade, J. in *Mancharam v. Kalidas*, 19 Bom. 821 (826); *Malsabhai v. Vithoba*, 7 Bom. H.C.B. App. 26. Cf. *Amir Husain v. Sheo Buksh*, 11 Oal. 6; *Balakrishna's case*, 40 Med. 793: 22 C.W.N. 50 (P.O.).

Costs:—Where an appeal is prohibited under this section, no appeal lies as to costs alone, *Ram Ghulam v. Shab Din*, 1892 A.W.N. 28.

C. P. Code how far applies:—*Vide*, notes at p. 594, ante, also, *Kanhaiya v. Kanhayya*, 46 All. 372: 22 A.L.J. 845: A.I.R. 1924 All 376: 79 I.O. 868.

385. [Suc. Cert. S. 20] Save as provided by this Act, a certificate granted thereunder in respect of any of previous certificate, probate or letters of administration. the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

Effect of a Certificate:—The existence of a previous certificate or of probate or letters of administration invalidates the subsequent grant of a certificate. But if the previous grant has ceased to be in force, a subsequent grant is possible. Cf *Re Sarojebashini*, 20 C.W.N. 1125 (cited at p. 713, ante). *Vide* also the notes and cases under secs 381 and 215, ante. This section read with sec. 382 precludes the granting of a certificate, where a certificate has already been granted by the Political Agent of a Native State, which the Judge in British India is bound to recognise, *Annapurnabai v. Lakshman*, 19 Bom. 145.

Separate Certificate:—A separate certificate cannot be applied for and granted to each and every heir entitled to a fractional share in the estate of the deceased, so as to qualify him to separately recover his share of the debts, *Shamsunnissa v. Wajid*, 1890 A.W.N. 91.

386. [Suc. Cert. S. 22] Where a certificate under this Part has been superseded or is invalid by reason of the validation of certain payments made in good faith to holder of certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named in an appellate order under section 384, or by reason of a certificate having been previously granted, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession.

sion or invalidity, shall be held good against claims under any other certificate.

Effect of bona fide payment under superseded, revoked or invalid Certificates:—
Vide notes and cases under secs. 216 and 297, ante. Cf. also *Re Chamberlain*, L.R. 1 P. & D. 816; *Ratna Bai v. Makhan Singh*, (1968) 1 Andhra W.R. 55.

387. [Suc. Cert. S. 25] No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

Effect of Decision under this Part:—No decision under this Part upon the question of right between the parties bars the trial of the same question in any subsequent suit or proceeding between the same parties. The certificate only authorises collection of the debt due to the deceased, *Jigri v. Syed Ali*, 6 C.W.N. 494; *Murli v. Achut Das*, 5 Lab. 105: A.I.R. 1924 Lah. 493. It is no proof of the certificate-holder's title to the debt, *Ramu Singh v. Aghori Singh*, A.I.R. 1988 Pat 68-178 I.C. 487. In fact, the value of certificate in proving title is nil, *Ibrahimatulla v. Saleha Bibi*, 1998 A.W.R. 21 (B.R.). Proceedings hereunder are of a summary character, and therefore the decisions of a Certificate Court cannot be finally binding upon the parties, *Rattan v. Chaudhuri*, 2 Lab. LJ 578: 68 I.C. 802; Cf. *Saheb Ram v. Govindi*, 43 All. 440: 19 A.L.J. 268: 60 C. 774. The decision of the Ceertificate Court is not conclusive and cannot operate as res judicata in a regular suit, *Ram Suran v. Gappu Ram*, 71 P.W.R. 1916: 88 I.O. 603; *Murli Das v. Achut Das*, A.I.R. 1924 Lah. 493-92 I.C. 198. So, a finding as to relationship given in a proceeding under this Part will not bar the trial of the same question in other proceedings, (e.g. under sec 278, *supra*) between the same parties, *Mariyal v. Ashraf Bibi*, A.I.R. 1925 Oudh. 670: 88 I.C. 612; *Ratna Bai v. Makhan Singh*, (1968) 1 Andhra W.R. 55. In cases where a certificate is not necessary, its value is far less. Thus, no certificate is necessary for suing on a mortgage as the heir of the deceased mortgagor. If the heir gets himself armed with a certificate unnecessarily, that will not give him title to the mortgage-debt or prove his heirship. He has to allege and prove his title on the basis of heirship, and if necessary, amend his plaint on that footing, *Ramu Singh v. Aghori Singh*, *supra*.

388. [Suc. Cert. S. 26] (1) The State Government may, by notification in the official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge :

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court and may either himself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge, shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge.

*N.B.—*This section enables the Local Government to invest any Court inferior in grade to a District Judge with power to exercise jurisdiction under this Part by means of a notification in the local official Gazette; for the notification issued under this Part (1) in N.W.P. & Oudh, see N.W.P. & Oudh, List of Local R. & O. Ed. 1894 p. 126. (2) in Bombay, see Bombay List of Local R. & O. Vol. I. Ed. 1896. pp. 495-97; (3) in Madras, see Madras List of Local R. & O. Vol. I Ed. 1898. pp. 227-28. (4) in Assam, see Assam Manual of Local R. & O. Ed. 1893. p. 268.

Sub-sec (1) & (2). Investiture of Inferior Courts with Jurisdiction :—The following are some of the instances where such Courts have been invested with jurisdiction hereunder. (1) A Subordinate Judge of the second class in the Punjab,

he can exercise jurisdiction over case of debts exceeding Rs. 5,000, *Rattan v. Chaudhuri*, 2 Lab. L.J. 576 : 88 I.C. 302 ; (2) A Subordinate Judge in Bombay who can also hear applications under sec. 2 of the Bombay Regulation VIII of 1897, *Pitamber v. Iewar*, 17 Bom. 280 : *Javermal v. Naeir of Poona*, 18 Bom. 748. In some places, even Munsifs have been invested with powers hereunder. A Civil Judge in C.P. who is not inferior in grade to the District Courts cannot be invested with power hereunder, *Hiralal v. Khushaliram*, 16 O.P.L.R. 64, but a Subordinate Judge in that Province is an inferior Court although he happens to be an additional District Judge and is invested with the powers of a District Judge, *Bissoor Shesdayal v. Jairam*, 1940 N.L.J. 106 = A.I.R. 1940 Nag. 162 = 187 I.C. 119. A High Court notification under sec. 29(1) of the Madras Civil Courts Act is no substitute for a notification contemplated in this section and cannot confer any power upon a Subordinate Judge to entertain applications under Part X of the Act, *Engaraja Rao v. Tulsibas Ammal*, (1949) 1 M.L.J. 650 = 1949 M.W.N. 161 = A.I.R. 1949 Mad 618.

Assistant District Judge :—The position of such Judges under the Bengal N.W.P. and Assam Civil Courts Act (XII of 1887) is much better, and they can deal with any matter coming to them by assignment from the District Court. *Vide* notes under "Power of Transfer" and under a like heading at pp. 602 and 605. But under the Bombay Act XIV of 1869, the District Judge cannot refer to an assistant Judge applications under special Acts for disposal, *First Assistant Collector v. Ardesir*, 16 Bom. 277.

No delegation of duty :—A District Judge cannot delegate to a Subordinate Court the duty of enquiring into the circumstances of a case, reserving to himself the power of making the final order, *Rai Koer v. Rupan*, 142 P.R. 1889.

Concurrent Jurisdiction :—Where the Subordinate Judge going into the merits of a case refused the application, the District Court cannot grant a certificate on a fresh application, *Chhonganlal v. Bas Natho*, 1896 P.J. 597.

Clause (4): Withdrawal of a Case :—The District Judge can withdraw any proceeding from an inferior Court to his own Court, but such power can be exercised only where the case is pending decision, *Sukhsia v. Secretary of State*, 21 O.L.J. 154 : 19 C.W.N. 651 : 97 I.C. 821.

Appeals from inferior Courts :—*Vide* notes under sec. 384, *supra*, at p. 723, ante; also read A.I.R. 1960 Raj. 9 and the other cases cited there. As the Proviso merely detracts from the section to which it applies, it necessarily follows that where there has been no notification by the Provincial Government, the proviso to sub-sec. (2) does not apply, *Ramanand v. Parkashanand*, A.I.R. 1989 Pesh. 30 = 183 I.C. 657.

Forum of appeal from order of Senior Sub-Judge of N.W.F.P. — Where the Senior Sub-Judges have been invested with powers to hear applications under this Act, they have not been so empowered by a Notification of the Local Government as required by this section; the normal course of appeal laid down in N.W.F.P. Courts Regulation is therefore not affected, and the appeal from an order made by the Senior Sub-Judge on an application under the Act lies to the Judicial Commissioner's Court and not to the Court of the District Judge. *Mt. Durga Devi v. Rupchand*, A.I.R. 1938 Pesh. 62—177 I.O. 705.

389. [Suc. Cert. S. 27] (1) When a certificate under this *Part* has been superseded or is invalid from any of the causes mentioned in section 386, the holder thereof shall, on the requisition of the Court which granted it, deliver it up to that Court.

(2) If he wilfully and without reasonable cause omits so to deliver it up, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

Compare the provisions of this section with those of sec. 296, *ante*, and *vide* the notes and cases thereunder.

390. [Suc. Cert. S. 28] Notwithstanding anything in Bombay Regulation No. VIII of 1827, the provisions of Provisions with respect to certificates under section 370, sub-section (2), section 372, sub-section (1), clause (f), and sections 374, 375, 376, 377, 378, VIIth of 1827. 379, 381, 383, 384, 387, 388 and 389 with respect to certificates under this *Part* and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be made applicable, apply, respectively, to certificates granted under that regulation, and applications made for certificates thereunder, after the 1st day of May, 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

By virtue of this section, sec. 384 will be applicable to an order refusing to grant a certificate of heirship under Bombay Regulation VIII of 1827; therefore an appeal will lie from such an order, *Rangubai v. Abaji*, 19 Bom. 899; *Javermal v. Nizir of Poona*, 18 Bom. 748.

PART XI.
MISCELLANEOUS

391. [Pro. S. 149] Nothing in *Part VIII, Part IX or Part X* shall—

- (i) validate any testamentary disposition which would otherwise have been invalid;
- (ii) invalidate any such disposition which would otherwise have been valid;
- (iii) deprive any person of any right of maintenance to which he would otherwise have been entitled; or
- (iv) affect the Administrator General's Act, 1913.

Saving:—This section says that nothing in Parts VIII to X. (1) will validate an otherwise invalid disposition, or (2) invalidate a valid disposition, or (3) affect any person's right of maintenance or (4) any provision of the Administrator-General's Act (III of 1913). Compare the provisions of this section with the Restrictions at pp 83 and 85.

Invalid Dispositions:—A disposition which is otherwise invalid cannot be validated by anything contained in Parts. VIII-X. *Vide* the notes and cases at pp. 86 to 87, *ante*. Also the cases discussed in *Girish Chunder v. Broughton*, 14 Cal. 861.

Right of Maintenance:—Clause (iii) prohibits the making of a testamentary disposition in derogation of a person's right of maintenance, *vide* under "power to bar right of maintenance" at p 87, *ante*. See also *Promoohanath v. Nagendrabala*, which lays down that a widow cannot be deprived of her right to maintenance by any provision in a Dayabhaga will. Compare the provision of this clause with sec. 33 of the New Zealand Family Protection Act, under which the testamentary Court has power to make adequate provision for an inadequately provided wife only if the testator's estate permits it; read also *Amy Dillon v. Public Trustees of New Zealand*, 197 I.C. 371 (P.C.).

If right of maintenance can be granted by will:—See *Gopal v. Bajrang*, A.I.R. 1929 Nag. 67 - 117 I.C. 286.

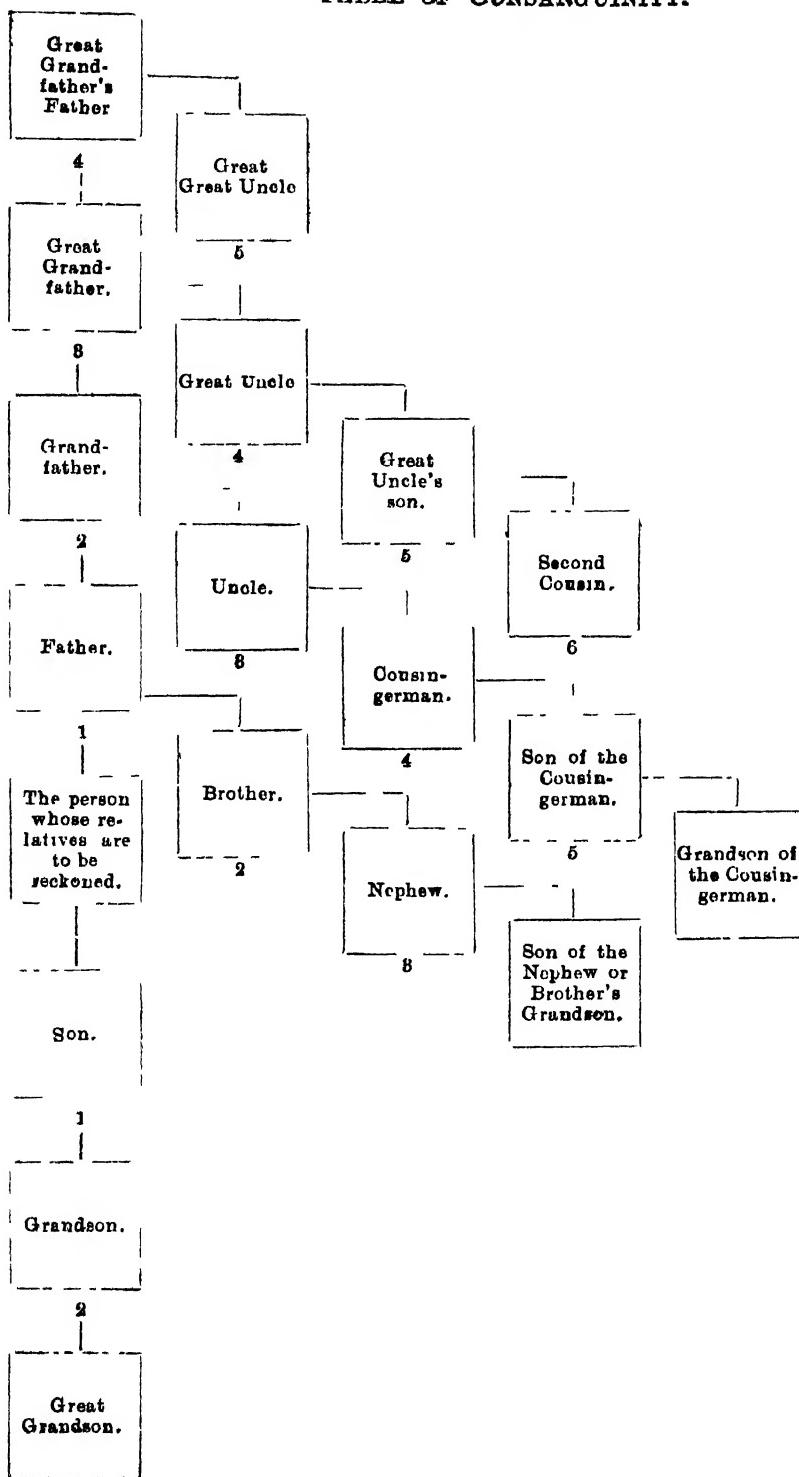
Administrator-General:—The provisions of the Act do not affect those of the Administrator-General, *vide Administrator-General v. Premal*, 22 Cal. 788. *Vids* also the notes and cases under the heading "Administrator-General" at pp. 447, 520, 528, 564, 613, *ante*.

392. [NEW] The enactments mentioned in Schedule IX are hereby repealed to the extent specified in the third column thereof.

Repeals:—*Vide Schedule IX below*. Note that section 13 of the Succession Certificate Act. 1889 (which deals with the question of Court Fees) remains in force.

Sec. 392 and Schedule IX have been repealed by Act XII of 1927.

SCHEDULE I.
(See section 28.)



SCHEDULE II.

PART I.

(See Section 54.)

(1) Father and Mother

(2) Brothers and sisters, (other than uterine brothers and sisters) and lineal descendants of such of them as have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

PART II.

(See Section 55.)

(1) Father and mother.

(2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather, and the lineal descendants of such of them as have predeceased the intestate

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

(7) Uterine brothers and sisters and the lineal descendants of such of them as have predeceased the intestate

(8) Maternal grandfather and maternal grandmother.

(9) Children of the maternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(10) Widows of brothers or half-brothers.

(11) Paternal grandfather's son's widow.

(12) Maternal grandfather's son's widow.

(13) Widowers of deceased lineal descendants of the intestate who have not married again before the death of the intestate.

(14) Maternal grandfather's father and mother.

(15) Children of the maternal grandfather's father and lineal descendants of such of them as have predeceased the intestate.

(16) Children of the paternal grandmother and the lineal descendants of such of them as have predeceased the intestate.

- (17) Paternal grandmother's father and mother.
- (18) Children of the paternal grandmother's father, and the lineal descendants of such of them as have predeceased the intestate.

SCHEDULE III.

(See Section 57.)

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57.

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, and 190

*Restrictions and modifications in application of
foregoing sections.*

1. Nothing therin contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.

2. Nothing therin contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying section 70 the words "than by a marriage or" shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

SCHEDULE

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SCHEDULE IV.

[See section 274 (2).]

FORM OF CERTIFICATE.

I. A. B. Registrar (or as the case may be) of the High Court of Judicature at (or as the case may be) hereby certify that on the

day of , the High Court of Judicature at

(or as the case may be) granted probate of the will (or letters of administration of the estate) of C. D. late of , deceased, to E. F. of and G. H. of , and that such probate (or letters) has (or have) effect over all the property of the deceased throughout the whole of British India

SCHEDULE V

[See section 284 (4).]

FORM OF CAVEAT

Let nothing be done in the matter of the estate of A. B. late of

, deceased, who died on the day of

, without notice to C. D. of .

SCHEDULE VI

[See section 289.]

FORM OF PROBATE

I, , Judge of the District of [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known that on the day of in the year , the last will of , late of , a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to , the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

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SCHEDULE VII.

(See section 290.)

FORM OF LETTERS OF ADMINISTRATION.

I, , Judge of the District of , [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known that on the day of letters of administration (with or without the will annexed, as the case may be), of the property and credits of , late of , deceased, were granted to , the father (or as the case may be) of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VIII.

(See section 377.)

FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE.

In the Court of

To A. B.

Whereas you applied on the day of for a certificate under Part X of the India Succession Act, 1925, in respect of the following debts and securities, namely :—

Debts.

Serial Number.	Name of debtor.	Amount of debt, including interest, on date of application for certificate.	Description and date of instrument, if any, by which the debt is secured.

SCHEDULE VIII—CONTD.

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Securities.

Serial number.	DESCRIPTION.			Market value of security on date of application for certificate.
	Disting- guishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This certificate is accordingly granted to you and empowers you to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this _____ day of

District Judge.

In the Court of
On the application of *A B* made to me on the _____ day of
I hereby extend this certificate to the following debts and securities, namely —

Debts.

Serial number.	Name of debtor	Amount of debt, including interest, on date of application for extension.	Description and date of instrument, if any, of which the debt is secured.

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Securities.

Serial number.	DESCRIPTION.			Market value of security on date of application for extension.
	Distin- guishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This extension empowers A. B. to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this _____ day of

District Judge

SCHEDULE

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SCHEDULE IX
(See Section 392)
ENACTMENTS REPEALED.

Number and Year.	Short title	Extent of repeal
XIX of 1841	The Succession (Property Protection) Act, 1841.	So much as has not already been repealed.
X of 1865	The Indian Succession Act, 1865.	So much as has not already been repealed.
XXI of 1865	The Parsi Intestate Succession Act, 1865.	The whole Act.
XXI of 1870	The Hindu Wills Act, 1870.	So much as has not already been repealed.
III of 1874	The Married Woman's Property Act, 1874.	The last paragraph of section 2.
V of 1881	The Probate and Administration Act, 1881.	So much as has not already been repealed.
VI of 1881	The District Delegates Act, 1881.	The whole Act.
VI of 1889	The Probate and Administration Act, 1889.	So much as has not already been repealed.
VII of 1889	The Succession Certificate Act, 1889.	So much as is unrepealed, except section 18.
VII of 1890	The Probate and Administration Act, 1890	So much as has not already been repealed.
VII of 1901	The Native Christian Administration of Estates Act, 1901.	So much as has not already been repealed.
VIII of 1908	The Probate and Administration Act, 1908.	So much as has not already been repealed.
XVIII of 1919	The Repealing and Amending Act, 1919	So much of Schedule I as refers to Act X of 1865 or to Act V of 1881.
XXXVIII of 1920	The Devolution Act, 1920.	So much of Schedule I as refers to Act X of 1865 or to Act V of 1881.

This Schedule has been repealed by the Repealing Act, 1927 (XII of 1927), sec. 2 and Schedule.

APPENDIX A.

Council of State Bill No 2 of 1925.

The following Bill was introduced in the Council of State on the 4th March, 1925.

No. 2 of 1925.

A Bill to amend the Succession Certificate Act, 1889.

Whereas it is expedient to afford protection to parties paying as well as debts to the representatives of deceased persons, claims payable under policies of assurance effected on their lives; it is hereby enacted as follows:—

1. (1) This Act may be called the Succession Certificate (Amendment) Act, 1925.

(2) It shall come into force on the.....day of.....1925.

2. Sub-clauses (a) and (b) of sub-section (1) of Sec. 4 of the Principal Act are repealed and the following sub-clauses shall be substituted therefor namely:—

"(a) pass a decree for payment of

(1) any debt accrued or accruing due to a deceased person at the time of his death,

(2) any claim arising out of any policy of assurance effected on the life of the deceased whereby the moneys to be paid thereunder are expressed to be payable to his executors or administrators, to a person (other than an assignee of such debt or claim), claiming to be entitled to the effects of the deceased person or any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against a debtor of the deceased a decree or order for the payment of his debt."

3. The words "or claim" shall be inserted after the word "debt" and the words "or claims" after the word "debts" wherever the same occur in the Principal Act respectively,

STATEMENT OF OBJECTS AND REASONS.

"The sole purpose of the Bill is to assist towards the speedy settlement of claims under policies for life assurance and to afford adequate security to companies making payments. Expedited settlement of claims is a matter of as much concern to the paying companies as to claimants, but it is frequently obstructed by the failure on the part of claimants to adduce necessary proof of title. Under the terms of a policy, the monies are payable to the executors or administrators of the deceased, and companies accept the modified form of grant as constituted by a succession certificate as sufficiently complying with the condition. But cases occur with some frequency where subordinate Courts refuse applications for certificates on the ground that they are unnecessary for the enforcement of claims for policy monies. A company is then placed in this position : that it has either to admit and pay the claim with the possible risk of being called upon to pay again to a future claimant, or decline to entertain the claim without production of a grant or certificate, and in such case compel the claimant to institute a suit to establish his title. But as the policy of companies is to avoid litigation except in an extreme case, the practice is to accept the title of the claimant on such evidence as may be adduced in the nature of declarations and affidavits which in themselves are inconclusive and afford no actual security in the event of payment being subsequently proved to have been made erroneously. It will be seen then that insurance companies, in the pursuit of their object to secure a speedy settlement of claims and in affording to claimants the greatest amount of assistance voluntarily expose themselves to risks which it would be admitted ought not properly to be undertaken by them, and it will be generally agreed that such a system should not be allowed to continue unless valid objections can be put forward against its abolition. So far as can be ascertained, no such objection can be raised, and the Bill which is now introduced incorporates merely a simple measure whereby any claimant to policy monies will be compelled to apply for a succession certificate in proof of his title. As already explained, the difficulty which is experienced has arisen by reason of Subordinate Courts having held that a certificate is not necessary in certain cases. If a positive enactment is introduced specifically bringing claims under policies within the scope of the Act, all uncertainty on this head will be eliminated ; a certificate will issue as of course at a small cost to the claimant, and the claim will be immediately settled.

"It will be observed that the general form of the section has been somewhat altered and that an amendment has been inserted with regard to the provisions as to payment of a debt. The reason for this alteration is to be found in the uncertainty which has occasionally arisen in cases dealt with by subordinate Courts, by which it has been held that only debts which have become payable to the deceased at the time of his death fall within the category of debts to which the Act is applicable. The definition of a debt has been exhaustively discussed by the

Calcutta High Court in the case reported in 18 G.W.N., but it would seem that some inferior Courts are not disposed to follow the ruling in that case, and the present is considered an opportune occasion to introduce an amendment which will obviate the possibility of future controversy on the point and will give effect to what was undoubtedly the intention of the principal Act. Both provisions are considered necessary as it is at any rate doubtful whether a claim under a policy falls within the category of debts the contrary having been held in certain cases, and unless the enactment is made specifically applicable to claims under policies, an amendment on other lines must necessarily give rise to further litigation." See Gazette of India, dated the 7th March 1925, Part V, pages 65-66).

APPENDIX B.

SCHEDULE III.

(See section 19 I)

FORM OF VALUATION (TO BE USED WITH SUCH MODIFICATIONS, IF ANY,
AS MAY BE NECESSARY).

IN THE COURT OF

*Re Probate of the Will of
the property and credits of*

*, (or administration of
, deceased.*

I

*{ solemnly affirm
make oath }*

and say that I am the executor (or one of the executors or one of the next of kin) of , deceased, and that I have truly set forth in Annexure A to this affidavit all the property and credits of which the above-named deceased died possessed or was entitled to at the time of his death, and which have come, or are likely to come, to my hands.

2. I further say that I have also truly set forth in Annexure B all the items I am by law allowed to deduct.

3. I further say that the said assets, exclusive only of such last-mentioned items, but inclusive of all rents, dividends and increased values since the date of the death of the said deceased, are under the value of.

1. This schedule was inserted by the Court-fees Amendment Act, 1899 (XI of 1899), s. 87, General Acts, Vol. V. The original Schedule III was repealed by Act. XIV of 1870.

APPENDIX B

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ANNEXURE A.

	Rs.	A.	P.
VALUATION OF THE MOVEABLE AND IMMOVEABLE PROPERTY OF , DECEASED.			
Cash in the house and at the banks, household goods wearing-apparel, books, plate, jewels, etc.			
(State estimated value according to best of Executor's or Administrator's belief).			
Property in Government securities transferable at the Public Debt Office.			
(State description and value at the price of the day; also the interest separately, calculating it to the time of making the application).			
Immoveable property consisting of			
(State description, giving, in the case of houses, the assessed value, if any, and the number of years' assessment the market-value is estimated at, and, in the case land, the area, the market-value and all rents that have accrued).			
Leasbold property			
(If the deceased held any leases for years determinable, state the number of years' purchase the profit rents are estimated to be worth and the value of such, inserting separately arrears due at the date of death and all rents received or due since that date to the time of making the application)			
Properties in public companies			
(State the particulars and the value calculated at the price of the day, also the interest separately, calculating it to the time of making the application).			
Policy of insurance upon life, money out on mortgage and other securities, such as bonds, mortgages, bills, notes and other securities for money.			
(State the amount of the whole, also the interest separately, calculating it to the time of making the application).			
Book debts			
(Other than bad).			
Stock in trade			
(State the estimated value, if any)			
Other property not comprised under the foregoing heads.			
(State the estimated value if any).			
TOTAL . . .			
Deduct amount shown in Annexure B not subject to duty.			
NET TOTAL . . .			

THE INDIAN SUCCESSION ACT

ANNEXURE B.

SCHEDULE OF DEBTS, ETC.

	Rs.	A.	P.
Amount of debts due and owing from the deceased, payable by law out of the estate.			
Amount of funeral expenses
Amount of mortgage incumbrances
Property held in trust not beneficially or with general power to confer a beneficial interest.			
Other property not subject to duty
TOTAL	...		

APPENDIX C.

POST OFFICE SAVINGS BANK.

Procedure to be followed in cases of Succession and Guardianship.

37. (1) If a depositor should die, leaving in a Post Office Savings Bank a balance in cash not exceeding three thousand rupees, and if probate of his will, or letters of administration of his estate, or a certificate granted under Act VII of 1889, be not produced to the Post-Master General within three months of the date of the said deposit the Post-Master General may pay the said sum of money to any person appearing to him to be entitled to receive it or to administer the estate of the deceased.

(2) The Post-Master General may also determine under Section 19 of the Indian Securities Act, 1920, who is the person entitled to Government Securities standing in the name of a deceased depositor and kept in the safe custody of the Accountant-General Posts and Telegraphs if the nominal or face value of such securities does not in the aggregate exceed Rs 6,000 and probate of the deceased depositor's will or letters of administration of his estate or certificate granted under Act VII of 1889, be not produced to Post-Master General within six months of his death.

Note—If the deceased depositor was a minor in whose name more accounts than one stand open the balances at credit of all these accounts will be added together for the purpose of applying this rule.

38 Cash balances in excess of Rs. 3,000 or Government securities in excess of Rs. 5,000 in the custody of the Accountant-General, Posts and Telegraphs, may only be paid on production of probate, letters of administration, or a certificate under Act VII of 1889. In the former case the Director-General has, however, discretionary power to dispense with such evidence, if he is of opinion that to require it would cause hardship, and that to dispense with it would involve no appreciable risk.

Note—If the deceased depositor was a minor in whose name more accounts than one stand open the balances at credit of all these accounts will be added together for the purpose of applying this rule. (*Vide* pages 118, Post and Telegraph Guide).

Payment of Cash Certificate belonging to the deceased holder.

8. (1) If a holder of cash certificates should die, leaving certificates not exceeding five thousand rupees in value and if probate of his will, or letters of administration of his estate, or a certificate granted under Act VII of 1889, be not produced to the Post-Master-General within three months of the death of the said holder, the Post-Master-General may pay the value of the certificates to any person appearing to him to be entitled to receive it or to administer the estate of the deceased.

(2) Certificates produced in joint names are ordinarily payable to the surviving joint holder when one of the joint holders is dead; and the head postmaster of the office in which or in one of the sub offices attached to which the certificates are for the time being registered is competent to issue orders of payment in such cases. When both the joint holders are dead such certificates are payable under the orders of the Post-Master-General, to the representative of the last surviving joint holder. (*Vide Ibid.* p. 128).

MODEL FORMS

1. WILL.

Will of everything to Wife or Husband or Son etc.

THIS IS THE LAST WILL of me A of &c. I give all my property to my dear wife (or to husband, son &c) B and appoint her (or him) the sole executrix (or executor) of this my will. In Witness whereof I here set my hand this..... day of.....19.....

Signature of Testator.

Signed (or marked) by the above-named A as his (or her) last will in our presence, (or signed by the direction of the said A by.....in presence of the said A) (or acknowledged by the said A before us as having been signed marked by him or by another under his direction and presence) Theday of.....19.....

Witnesses.

2 WILL (Another Form)

*Will gives testator's property to wife for life
and then to his children.*

THIS IS LAST WILL of me A of &c. I hereby appoint B of &c, and C of &c., my trustees to be the executors and trustees of this my will and I hereby appoint my wife D of &c, during her life and after death, my said trustees, to be the guardians of my infant children; I give all my property to the said trustees to convert the same into money and to invest the same most profitably (or to manage the same to the best of their discretion ; and to pay income of the proceeds or of the property) to my wife during her life and after her death to divide the assets equally among all my children who attain the age of 18 years, or marry under that age with power for my trustees with the consent of my said wife, if living and if not, at their own discretion to raise the whole or any part of the share of any infant child and to apply the same for his benefit. In witness whereof etc., as in form No 8.

3. WILL (Another Form)

This Will is executed by me Sarojini Devi, of 5, Chittaranjan Road, Bhowanipur, Thana.....District.....widow of late.....by caste.....by profession &c., and I make the following provisions regarding my properties in this my last Will or Testament. My only son Barat Chandra Banerji died leaving him surviving his two sons, Sriman A and B. I am now far advanced in age and have been keeping indifferent health, and it is proper that I should make provision with respect to my properties after my death

I bequeath by this will all my properties (indicate how she got them) which are now in my possession to my said two grandsons, A and B in equal shares after meeting the expenses for the purposes hereinafter mentioned and in case my said grandson Sriman B dies without leaving any son, then his moiety share of the properties is to go to my other grandson, said Sriman A. I appoint Sriman A the executor of this my will. He will collect the debts due to me and pay my creditors (state the manner). My said executor shall establish a *Thakur* in the math of my deceased husband and provide for the daily worship thereof and set apart Rs. 5,000 for that purpose and keep the money invested in.....securities. If this sum of Rs 5 000 cannot be obtained in cash after defraying my funeral expenses to a reasonable extent and after payment of debts, the executor will have power to sell my immoveable properties for the purpose. The residue remaining thereafter will be divided among my grandsons A and B as aforesaid. To this effect I execute this will and I sign it in sound health and in full possession of my senses in the presence of the witnesses mentioned below, this the.....day of.....19.....

Witnesses etc.

4 WILL (Another Form)

This is the Last Will of me A &cI appoint B &c . my executors and trustees of this my will and I give them all my property in Trust to give to D my daughter, E my brother, F my sister, etc., the following articles, viz . to Dto E &cto F &c ., and to convert the rest of the property into money by sale or otherwise and to divide the proceeds less my funeral and testamentary expenses, among all my children in equal shares. In witness, &c.

5. WILL (Another Form)

This is the Last Will and Testament of me, A B C son of.....of.....in the district of..... Being in a bad state of health and being desirous of making provisions as regards my properties after my death I do hereby devise and bequeath as follows:—

1. I appoint my sons.....to be the executors and trustees of my Will and I declare that all trusts and powers hereinafter reposed and vested in my executors and trustees shall or may be exercised by the survivors and survivor of them.

2. I direct my executors and trustees to pay in the first place out of my estate all my just debts and testamentary expenses and also to spend the sum of Rs.....for my funeral and *sradha* expenses

3. I give to my wife Srimati.....Govt. Promissory Notes of 5 p.c. loan of the nominal value of Rs.....absolutely to be paid and made over to her within six months after my death and I also give and bequeath to my said wife Srimati.....my family dwelling house No. 7, Chittaranjan Road, in the town of Calcutta for her life only. I also bequeath to her absolutely all the jewellery, which she has been using.

4. I do hereby give devise and bequeath my business carried on under the name and style.....(of which I am now the sole proprietor) to A. B C and D being my first, second, third and fourth sons respectively in equal shares. To the said four sons I also give and bequeath all my ancestral and self-acquired properties situated in the districts of.....and....., and also all my household effects, furnitures &c and all properties, moveable and immoveable which I hold or stand possessed of.

5. I give devise and bequeath unto my two daughters Srimati.....and Srimati.....Rs.....in cash to be paid unto the said.....within (time) after my death.

6. I direct my executors to pay to my said wife Srimati.....during the term of Her natural life the sum of Rs. 20 per month for her personal expenses in addition to the other benefits provided for by this my Will.

7. I also direct my executors to set apart my Government Promissory Notes of 5 p.c. loan of the nominal value of Rs..... and out of the interest thereof to defray the expenses of the annual Annapurna puja festival and also of the daily *shoba* of my family Thakur Sri Sri Radhakrishna ji.

In witness whereof, I. A. B. O. the above-named testator have to this last Will and Testament set my hand this.....day.....of 1926.

[Signature of Testator.]

Signed in the presence of—

1.....

2

3.....

{ Witnesses.

6. CODICIL.

THIS IS A CODICIL to the Will and Testament of A. B of etc. which bears the date of.....day of....., WHEREAS by my said will I have appointed C.D. to be one of the trustees and Executors thereof, AND WHEREAS the said C.D. having lately died, I am desirous that E. F. of etc. shall be substituted as a trustee and executor of my said will in the place of the said C.D. Now THEREFORE, I do hereby appoint the said E.F. to be one of the trustees and executors of my said will, in the place of the said C.D. deceased; and take effect throughout as if the name of the said E.F. had been inserted in my said will instead of the said name of the C.D. and in all other respects I do confirm my said will. In witness etc.

7. PETITION FOR PROBATE.

In the Court of the District Judge of Burdwan.

Probate Case No. of 19...

The humble petition of.....of.....most respectfully sheweth :—

1. That the writing annexed herewith is the last will and testament of.....of.....who died at.....on the.....day of... 19.....within the jurisdiction of this Court, leaving at the time of his death, the properties specifically described in the annexed affidavit and that the said will was duly executed by the said deceased.
2. That the petitioner is the brother of the testator and is the executor named in the said will.
3. That the amount of assets which are likely to come to your petitioner's hand is Rs.....an account of which is given in Schedule A and the amount of his liabilities is Rs.....which is described in Schedule B of the annexed affidavit.
4. That, to the best of your petitioner's belief no application has as yet been made by anybody to any other Court for a probate of the said will or for letters of administration of the said properties.
5. Under the circumstances your petitioner prays that probate of the annexed will be granted to him.

And your petitioner as in duty bound shall ever pray.

I.....the petitioner above-named do hereby declare that what is stated in the above petition is true to the best of my information and belief.

[Signature of the Petitioner.]

I.....one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present, and saw the said testator affix his signature thereto.

[Signature of witness to the will.]

Schedule—A. } —vide at pp. 743-44, ante.
Schedule—B }

8. PETITION FOR LETTERS OF ADMINISTRATION.

In the Court of the District Judge of Murshidabad.
Cause Title &c.

The humble petition of . . . , of . . . , most respectfully sheweth :—

1. That late A. B. of died at on the day of 19, leaving properties situate within the jurisdiction of this Court. A description of the said properties is set forth in the affidavit annexed to the petition.

2. That a description of the relatives of the deceased, and their respective residences are given below :—

- (1) Son—(Petitioner)
- (2) Brother resident of
- (3) Widow Sremati resident of
- (4) Daughter Sremati resident of

3. The petitioner is the son of the deceased, and as such is entitled to letters of administration to the estate of the deceased.

4 State here the amount and details of Assets and Liabilities of the deceased.

5. That to the best of your petitioner's belief no application has as yet been made by anybody to any other Court for letters of administration of the estate of the said deceased.

6 Under the circumstances set forth above, your petitioner prays that letters of administration to the estate of A. B. may be granted to your petitioner.

And your petitioner as in duty bound shall ever pray.

I . . . the petitioner in the above petition, do hereby declare that what is stated therein is true to the best of my information and belief

[Signature of the Petitioner.]

9. APPLICATION FOR SUCCESSION CERTIFICATE.

In the Court of the District Judge of.....

To
. Esq

District Judge.

Application under
Sec. 872 of the Indian Succession
Act 39 of 1925.

The humble petition of
A. B. of

Respectfully Sheweth —

1. That C. D. of died on the and that at the time of his death his ordinary residence was at (within the jurisdiction of this Court) and he was possessed of property within the jurisdiction of this Court.
2. That the said C. D. died leaving him surviving the following members of his family and near relatives residing in the places mentioned against their names viz :—

B.F.—of place or residence (state relation) of the deceased.

G.H.— ditto ditto ditto &c.

and A. B. of the petitioner the of C. D. and the said A. B. as such (relation) claims the right to obtain the Succession Certificate in respect of the Estate of the said C. D. consisting of the debts and securities as hereafter mentioned.

That there is no impediment to the grant of the Succession Certificate to your petitioner under Sec. of Act 89 of 1925.

4. That the debts and securities in respect of which your petitioner prays to obtain the Certificate of Succession are particularly specified in Schedule A hereunder annexed.

5. Your petitioner therefore prays that Succession Certificate may be granted to your petitioner in respect of the said debts and securities and for the collection of the debts and for the transfer or otherwise of the securities.

And your petitioner, &c.

10. APPLICATION FOR EXTENDED CERTIFICATE.

In the Court of Midnapore.

Case No. of 1926 (Succession Certificate)

In the matter of versus

and in the matter of an application under sec. 376 of
Act XXXIX of 1926.

The humble petition of
of etc.

Most respectfully sheweth :

That by an order of this Court dated the a Succession Certificate was granted to your petitioner with respect to some of the securities or debts due to (deceased) under Part X of the aforesaid Act.

2. That the said certificate did not include the debts and securities specified in the Schedule annexed hereto.

THE INDIAN SUCCESSION ACT

3. That to the best of your petitioner's information and belief, no application has yet been made to any Court for grant of probate or letters of administration with respect to the estate of the aforesaid deceased and consequently there is no impediment within the meaning of sec. 872(e) to the grant of an extended certificate herein prayed for.

Therefore your petitioner prays that your Honour be graciously pleased to extend the said certificate held by your petitioner to the debts and securities specified hereunder. And your petitioner as in duty bound shall ever pray.

[Verification]

[Signature].

[Schedule].

**11. APPLICATION FOR REVOCATION OF PROBATE
OR LETTERS OF ADMINISTRATION.**

See. 268.

In the Court of the District Judge of 24 Perganas
[Probate Jurisdiction].

Revocation case No. of 1925.

In the matter of an application for revocation of Probate granted on the 21st Dec. 1923 in case No. of 1923.

And in the matter of (names)—Petitioners.

vs.

(names)—Opposite Parties.

To

The District Judge of 24 Perganas.

The humble petition of the petitioners above named.

Most respectfully sheweth :

1. That your petitioners took an assignment of property X from the opposite No 2. K, who inherited the same from his deceased father, M.
2. That when your petitioners went to take possession of property X, the opposite party No. 1, B, resisted your petitioner's claim alleging that he was in possession thereof by virtue of a grant of probate (of the will executed by M) obtained on 21/12/1923 from your Honour.
3. That your petitioners have since made enquiries and have come to learn that the alleged will is a piece of forgery and that the grant was obtained in an ex parte proceeding fraudulently suppressing from the Court the material fact that

the alleged testator left a son, K, (from whom your petitioners took the aforesaid assignment) and without issuing any citation upon K.

4. That under the aforesaid circumstances the grant of probate to B, is vitiated by fraud and is liable to be revoked.

Therefore your petitioners pray that your Honour may be pleased to revoke the said grant and pass such other order or orders as your Honour may think fit and proper.

And your petitioner as in duty bound shall ever pray.

[Verification &c.]

12. PETITION OF OBJECTION TO THE ABOVE.

(CAUSE TITLE)

The humble petition of B opposite party No. 1 aforesaid.

Most respectfully sheweth :

1. That a notice has been issued upon your petitioner from your Honour's Court calling upon him to show cause why the grant of probate to your petitioner dated the 21st March, 1928, shall not be revoked and in obedience thereto your petitioner shows cause as follows :

(a) That the aforesaid petitioners have no locus standi to make the present application and that the same is not *bona fide*.

(b) That the assignment set up by the petitioners is a collusive affair and a mere paper transaction.

(c) That the will probate whereof has been granted to your petitioner is a genuine document and was duly executed by M, the deceased testator.

(d) That K is not the legitimate son of M and is no legal heir, and therefore was not entitled to any citation.

(e) That the petitioners and their vendor K were all throughout aware of the probate proceedings, but never took any exception to the grant, and therefore they are bound by estoppel, acquiescence and waiver.

(f) That it is not true that the grant was obtained by any fraudulent suppression.

THE INDIAN SUCCESSION ACT

Under the aforesaid circumstances your petitioner prays that your Honour be pleased to reject the application for Revocation, and to award your petitioner the costs of the present proceeding and to pass such other order or orders as your Honour may think fit.

And your petitioner as in duty bound &c.

[Verification].

13. APPLICATION FOR REVOCATION OF SUCCESSION CERTIFICATE

In the Court of the Subordinate Judge of , Mymensingh,
(exercising jurisdiction under Part X of Act XXXIX of 1925, being invested with power under Sec 388, thereof).

In the matter of Case No. of 1924
(Succession Certificate).

And in the matter of (name), Petitioner
vs.
(name) Opp party.
The humble petition of X, son of,
, by caste, by profession etc, at present residing at etc.

Most respectfully sheweth :

1. That, in the above case your honour was pleased to grant a Succession Certificate to M. to collect the debts due to deceased, of by an order dated the 1924.

2. That your petitioner is (state relationship) of the said deceased, whereas the said M. is (state relationship) of the deceased; and therefore your petitioner has a preferential claim under Dayabaga Hindu Law to succeed to the estate of the said deceased

3. That the aforesaid grantee, M. obtained the certificate by fraudulently concealing your petitioner's name from the Court and without issuing any citation upon your petitioner.

4. State one or other of the grounds mentioned in Sec. 388, according to circumstances.

5. That under these circumstance the grant of certificate to M. is vitiated and liable to be revoked.

Therefore your petitioner prays that your Honour may be pleased to revoke the certificate granted to the said M. and to call upon him to deliver up the same to Court, and to pass such other order or orders etc.

And your petitioner etc.

[Signature].

14. FORM OF EXEMPLIFICATION,

Sec. 228.

In the Court of.

BE IT KNOWN that upon search being made in the District Registry. it appears that on the day of. in the year. the last will and testament of A. B. late of. deceased, who died at. on or about. 19. and had at the time of his death a fixed place of abode at. within the district of. was proved by C. D. the executor named therein (or letters of administration, with the last will and testament annexed of A. B. late of &c. were granted to C. D. as the.), and which probate (or letters of administration) now remains of record in the said District Registry. The true tenor of the said will is in the words following to wit:

[Here follows the will].

In faith and testimony whereof these letters testimonial are issued.

Given at. as to the time of the aforesaid search and the sealing of these presents, this. day of. in the year 19.

[Signed]

15. FORM OF ADVERTISEMENT UNDER SEC 360.

"Pursuant to a decree [or an order] of the High Court of Judicature at Fort William in Bengal, in its Original Civil Jurisdiction, made in [set out the number and title of the suit or title of the matter], the creditors of A. B. late of—residence and additions, as thus: No. 6, Park Street in the Town of Calcutta, merchant who died in or about the month of 19. are, on or before the day of 19. to send to the office of the Registrar of this Court on its Original Side, their names, and addresses, and descriptions, the full particulars of the claims, a statement of their accounts, and the nature of the securities [if any] held by them; or in default thereof, they will be peremptorily excluded from the benefit of the said decree [or order].

Every creditor, holding any security, may produce or transmit the same to the Registrar, with the particulars of his claim, or shall produce the same before

the Hon'ble Mr. Justice in the Court house, on the
day of 19 , at of
the clock in the noon, being the time appointed for adjudicating on the claims.

16. SECURITY BOND.

(Bengal).

In the Court of the District Judge (or District Delegate)
of(district)

Case No. **of 1926**

Know all men by these presents that I.....of.....of,
P. S.....District.....(principal) am held and firmly bound to.....Esq.,
the District Judge (or District Delegate) of.....in the sum of Rsto be
paid to the said.....Esq., District Judge (or District Delegate) or to his
successors in office and we, sureties,.....and.....are jointly and severally
held and firmly bound to the said District Judge (or District Delegate) in the sum
of Rsto be paid to the said District Judge (or District Delegate) or to his
successors in office for the payment of which we the above bounden principal and
sureties bind ourselves, our heirs, executors, administrators and representatives
firmly by these presents.

Signed by ourselves and sealed with our respective seals this
day of 1926.

(Signature of witness)

(Signature of the Principal)

Signatures of the sureties.

Whereas, by an order of the Court of the District Judge (or District Delegate) of.....made on the day ofunder (section).the above-named principal has subject to his entering into a bond in Rs.with one or two surety or sureties in the sum of Rs.been granted probate (or letters of administration or succession certificate) in the goods of.....

And whereas the said (principal). has agreed to enter into the above-written bond, and the said sureties have agreed to enter into the above-written bond as sureties for the said. Now the condition of the above-written bond is, that if he the said (principal) do and shall justly and truly render account for what he may receive in respect of the property for which the probate (or letters of administration or succession certificate) is granted and shall indemnify the persons who may be entitled to the whole of such property or any part thereof in future and in all things conduct himself properly, then the above-written bond or obligation be void and of no effect, otherwise the same shall remain in full force and virtue.

Dated

(Principal).

Witnesses:

17. SECURITY BOND (another form).

(Madras)

CAUSE TITLE.

Know all men that we, A.B., (the administrator) of (residence and description), C.D., etc., and E.F., etc., (the sureties), are jointly and severally bound to J.K., Esqr. the Judge of the District Court of _____ in Rs. _____ to be paid to the said Judge or other Judge of the said Court for the time being. For which payment to be made we bind ourselves and each of us in the whole, and our and each of our heirs, executors and administrators, jointly and severally.

Dated this _____ day of _____

Whereas in the above matter the Judge has by order dated the _____ day of _____ approved of the above C.D. and E.F. as sureties for the said A.B., and has also approved of the above-written bond with the under-written condition as a proper security to be entered into by the said parties; and in testimony of such approbation, has signed his name in the margin: Now the condition of the above-written bond is such, that if the said A.B. (the grantee of the certificate) shall within one year from the grant to him of a certificate under the Succession Certificate Act, 1889, exhibit in his Court a full and true account of all debts and securities of the said C. D. deceased received by him and shall deliver and pay the same to such person or persons as shall be lawfully entitled thereto, then the above bond shall be void and of no effect, otherwise it shall remain in full force.

(Date etc.)

Signature etc.

18 ADMINISTRATION SUIT BY CREDITOR ON BEHALF
OF HIMSELF AND ALL OTHER CREDITORS.

(TITLE.)

A. B. the above-named plaintiff, states as follows:—

1. E. F. late of _____, was at the time of his death, and his estate still is indebted to the plaintiff in the sum of

[here insert nature of debt and security, if any]

2. E. F. died on or about the _____ day of _____

By his last will, dated the _____ day of _____ he appointed C. D. his executor [or devised his estate in trust, etc. or died intestate, as the case may be].

3. The will was proved by C. D. [or letters of administration were granted, etc.]

4. The defendant has possessed himself of the moveable [and immoveable, or the proceeds of the immoveable] property of E. F. and has not paid the plaintiff his debt.

5. [State facts showing when the cause of action arose and that the Court has jurisdiction].

6. [The value of the subject-matter for the purposes of jurisdiction].

7. The plaintiff claims that an account may be taken of the moveable [and immovable] property of E. F. deceased, and that the same may be administered under the decree of the Court.

19. ADMINISTRATION SUIT BY SPECIFIC LEGATEE.

1. E. F. late of died on or about day of
By his last will, dated the day of he
appointed C. D. his executor, and bequeathed to the plaintiff [here state the
specific legacy].

2. As in para 3 of the last form.

3. The defendant is in possession of the moveable property of E. F. and, amongst other things of the said [here name the subject of the specific bequest].

4 & 5, As in paragraphs 5 & 6 respectively of the last form.

The plaintiff claims that the defendant may be ordered to deliver to him the said [here name the subject of the specific bequest].

20 ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

(TITLE.)

E. F. the above-named plaintiff, states as follows:—

. By his last will, dated the _____ day of _____ .

he appointed the defendant and M. N. [who died in the testator's lifetime] his executors, and bequeathed his property, whether moveable or immovable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or daughter who should attain that age or marry, upon trust as to his immovable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property ; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property , he has sold some part of the immoveable property

4. As in para 5 in Form No 18.

5. As in para 6 in Form No 18

6. The plaintiff claims—

(1) to have the moveable and immoveable property of A. B. administered in this Court, and for that purpose to have all proper directions given and accounts taken ,

(2) such further or other relief as the nature of the case, may require.

21 DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE

1 A B's will contained a charge of debts, he died intestate , he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs , and the testator had some moveable property which the defendant got in and which produced the net sum of Rs.

2 The defendant applied the whole of the said sum and the sum of Rs which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator .

3 The defendant made up his accounts and sent a copy thereof to the plaintiff of the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer

4 The defendant submits that the plaintiff ought to pay the cost of this suit.

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